TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 264

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, APPELLANTS,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265

THE HAINES TILE & MANTEL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 266

THE JACKSON-WALKER COAL & MATERIAL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 19, 1914.

(24,405, 24,406, 24,407)

(24,405, 24,406, 24,407)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 661.

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, APPELLANTS,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 662.

THE HAINES TILE & MANTEL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 663.

THE JACKSON-WALKER COAL & MATERIAL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1914.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1914, of said Court, Before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Henry T. Reed, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the sixth day of December, A. D. 1913, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The New Hampshire Savings Bank and P. J. Conklin, are Appellants, and G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, are Appellees, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, consisting of pages 1 to 140, inclusive, is in the words and figures following, to-wit:

1 In the District Court of the United States, for the District of Kansas and Second Division.

In the Matter of Charles Bron, a Bankrupt.

In Bankruptcy, No. 585.

The New Hampshire Savings Bank and P. J. Conklin, Appellants.

vs.

G. F. Varner and W. E. Marshall, Partners doing business as The Wichita Lumber Company, Appellee.

NOTICE OF ELECTION.

To Morton Albaugh, Clerk of the Above entitled Court:

You are hereby notified that the New Hampshire Savings Bank and P. J. Conklin, appellants in the above entitled appeal, hereby elect to file in the Circuit Court of Appeals for the Eighth Circuit a printed copy of the record, or such parts thereof as may be requisite for the due and proper hearing of the above cause in said Circuit Court of Appeals, Eighth Circuit, pursuant to the provisions of the Act of Congress, entitled "An Act to diminish the expense of proceedings on appeal and writ of error or certiorari," approved February 13th, A. D. 1911.

Dated October 15th, A. D. 1913.

THE NEW HAMPSHIRE SAVINGS BANK,
By KOS HARRIS & V. HARRIS,
Its Attorneys.

P. J. CONKLIN,
By HOLMES, YANKEY & HOLMES,
His Attorneys,
Appellants.

Filed in the U. S. District Court Oct. 15, 1913.

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2 In the Circuit Court of Appeals of the United States, Eighth Circuit.

Appeals from the United States District Court of Kansas, Second Division.

In the Matter of Charles Bron, Bankrupt.

In Bankruptcy, No. 585.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,

vs.

G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, Appeal No. 172.

The Jackson-Walker Coal & Material Company, a corporation, Appeal No. 176.

J. C. Titus and J. H. Higley, partners as The Titus-Higley Lumber Company, Appeal No. 170.

The Home Builders Association, a corporation, Appeal No. 177.

A. S. Orr, doing business as The North End Hardware Company, Appeal No. 173.

The Haines Tile & Mantel Company, a corporation, Appeal No. 174.

Appellees.

STIPULATION IN TRIPLICATE.

The above named appellants, The New Hampshire Savings Bank, by Kos Harris and V. Harris, its attorneys, and P. J. Conklin, by Holmes, Yankey & Holmes, his attorneys, and the appellees, G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, by Brown & Brown, and Chester I. Long and Brubacher & Conly, its attorneys, The Jackson-Walker Coal & Material Company, by Noftzger & Gardner, its attorneys, A. S. Orr, doing business as The North End Hardware Company, by Brubacher & Conly, his attorneys, J. C. Titus and J. H. Higley, partners as The Titus-Higley
3 Lumber Company, by A. V. Roberts, their attorney, and The Haines Tile & Mantel Company, by Brubacher & Conly, its attorneys, being all of the attorneys of appellants and appellees in the above matter, stipulate for the trial in the Circuit Court of Appeals of the above appeals, as follows, to-wit:

First

That the debt of each party, appellants and appellees, was duly and legally established before the Referee in Bankruptcy, as preferred liens against the property known as the Waco Avenue property, in the City of Wichita, Kansas, and all said debts were duly established as liens on said property. That there is no contest between appellants and appellees as to the amount of the debt established, and no contest over the proposition as to all of said parties having a lien on said property, the contest being as to the priority of liens; the said debts and liens, as allowed and established by the Referee in Bankruptcy on January 27th, 1913, are as follows:

G. F. Varner and W. E. Marshall, partners as The Wichita Lumber Company	$3145.81
The Jackson-Walker Coal & Material Company	1029.45
The Home Builders Association	134.55
J. C. Titus and J. H. Higley, partners as The Titus-Higley Lumber Company	261.70

A. S. Orr, doing business as The North End Hardware Company	299.72
The Haines Tile & Mantel Company	1521.20
The New Hampshire Savings Bank of Concord, N. H.	8312.50
P. J. Conklin	5218.00

Conklin's mortgage, by stipulation in the same, is made inferior to the mortgage debt of The New Hampshire Savings Bank.

The said Referee at said time, established the mortgage lien of The New Hampshire Savings Bank in the sum afore-
4 said, as a first lien on the Waco Avenue property, the mortgage lien of P. J. Conklin in the sum aforesaid, as a second lien on said property, and the mechanic's lien of the mechanic's lien claimants aforesaid, in the sums set opposite their respective names, as third liens without preference on said property.

And said Referee at said time established the mortgage lien of Ruth Dillon, in the sum of $1660.00, as a first lien on what is known as the Second Street property, and prior to the mechanic's liens of The Wichita Lumber Company, A. S. Orr, as the North End Hardware Company, The Haines Tile & Mantel Company, and others. The Ruth Dillon mortgage has nothing to do with the settlement of the priorities of the appellants and appellees on the Waco Avenue property.

Second.

That within ten days after the 27th day of January, 1913, The Wichita Lumber Company, A. S. Orr, doing business as The North End Hardware Company, and The Haines Tile & Mantel Company, each filed a separate petition for review with the said Referee on the ruling, so made, establishing their liens as inferior to the mortgage liens aforesaid on the Waco Street property and on the Second Street property, and within said time, The Titus-Higley Lumber Company, The Jackson-Walker Coal & Material Company, and The Home Builders Association, each filed a separate petition for review with the Referee, and thereafter said petitions for review were docketed in the District Court, as follows:

170 Titus-Higley Lbr. Co vs. John H. Burns, Trustee.
172 Wichita Lbr. Co. vs. John H. Burns, Trustee.
173 North End Hdw. Co. vs. John H. Burns, Trustee.
174 Haines Tile & Mantel Co. vs. John H. Burns, Trustee.
176 Jackson-Walker C. & M. Co. vs. John H. Burns, Trustee.
177 The Home Builders Ass'n vs. John H. Burns, Trustee.

5 Third.

The United States District Court reversed the order of the Referee and established the liens of the mechanic's lien

holders, above named, appellees herein, as prior to the mortgages held by The New Hampshire Savings Bank and P. J. Conklin on what is known as the Waco Street property, and prior to the mortgage lien of Ruth Dillon on what is known as the Second Street property; all of said mechanic's liens being of equal priority and without preference.

And the Honorable John C. Pollock, Judge of the United States District Court, filed in proceeding Number 172, The Wichita Lumber Company vs. John H. Burns, Trustee, a full memoranda of decision, and in each of the other proceedings filed a separate memoranda of decision following that entered in said proceeding Number 172; and subsequently, after overruling the petitions for re-hearing, which had theretofore been granted, and at the September Term 1913, and on October 1st, 1913, entered separate orders in each of the above entitled and numbered causes in conformity to the memoranda of decision previously made on each petition to revise, filed by the said appellees herein.

Fourth.

The evidence taken before the Referee before the stablishment of the liens, and which was transmitted to Judge Pollock, was all in one record, as certified by the Referee, and the claims of the appellants and appellees were all argued and submitted before Judge Pollock at Kansas City.

Fifth.

Except as to the names and amounts, the transcript of the record on the appeal taken by the appellants to the Circuit Court of Appeals will be the same. It is distinctly understood by this stipulation that The Titus-Higley Lumber Company, whose
6 claim as established and allowed was in the sum of $261.70, The Homr Builders Association, whose claim was established and allowed for $134.55, and A. S. Orr, doing business as The North End Hardware Company, whose claim was established and allowed for $299.72, and prior to the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin, in the separate proceedings aforesaid, each respectively and separately reserve the right to question the jurisdiction of the Circuit Court of Appeals to hear and determine said appeals, as to them, for the reason that their separate claims do not exceed $500.00 in amount, and each waives no right which such appellee might have, had a separate appeal been perfected as to such appellee from the District Court to the Circuit Court of Appeals.

Sixth.

Subject to the above stipulation, it is further agreed that the appellants herein may make one record for the Circuit Court of Appeals, and serve on counsel for the appellees one brief, and

all of the six appeals shall be submitted to the Circuit Court of Appeals for the hearing together on said one record, and the said appellees may serve one brief on counsel for appellants, and said appeals shall be heard at the same term of Court and argued together on the same one record to be prepared by appellants; provided, any or all of such appellees may separately or jointly move to dismiss such appeal for want of jurisdiction, or on any other ground, and that said motion or motions may be heard at any time that will suit the convenience of the court; and provided further, said appellees may present a full and correct record in the Court of any omissions in or incorrect record prepared by the appellants.

7 Consent is hereby given for the United States Circuit Court of Appeals to make such order pursuant to this stipulation as the Court may seem proper in the premises, due notice of such order to be given to the appellees after the same is made.

Dated at Wichita, Kansas, October — 1913.

G. F. VARNER and W. E. MARSHALL,
Partners as The Wichita Lumber Company.
By Brown & Brown, Chester I. Long, Brubacher & Conly,
Their Attorneys.

THE HAINES TILE & MANTLE COMPANY,
By Brown & Brown, Chester I. Long, Brubacher & Conly,
Its Attorneys.

THE HOME BUILDERS ASSOCIATION,
By George Gardner, Its Attorney.

A. S. ORR, as THE NORTH END HARDWARE CO.,
By Brubacher & Conly, His Attorneys.

THE JACKSON-WALKER COAL & MATERIAL CO.,
By George Gardner, Its Attorney.

THE TITUS-HIGLEY LUMBER COMPANY,
By _____, Its Attorneys.

THE NEW HAMPSHIRE SAVINGS BANK,
By Kos Harris & V. Harris, Its Attorneys.

P. J. CONKLIN,
By Holmes, Yankey & Holmes, His Attorneys.

J. H. BURNS, Trustee,
By _____, His Attorney.

JOHN H. BURNS, Trustee.

Filed in U. S. District Court Oct. 30, 1913.

8 In the United States Circuit Court of Appeals, for the Eighth Circuit.

In the Matter of Charles Bron, A Bankrupt.

In Bankruptcy, No. 585.

The New Hampshire Savings Bank and P. J. Conklin, Appellants

vs.

G. F. Varner and W. E. Marshall, Partners as the Wichita Lumber Company, Appellees.

Appeal from the District Court of the United States, for the District of Kansas, Second Division.

PRECIPE FOR TRANSCRIPT.

To Morton Albaugh, Clerk of the United States District Court, for the District of Kansas and Second Division:

In connection with the appeal taken by The New Hampshire Savings Bank and P. J. Conklin from the order, judgment and decree rendered in the above entitled court on October 1st, 1913, granting to the said G. F. Varner and W. E. Marshall, partners as The Wichita Lumber Company, a first lien on the property known as the Waco Avenue property, and pursuant to a stipulation made and entered into by and between counsel, the appellants herein designate to you, as the parts of the record which they deem necessary for the consideration of the Circuit Court of Appeals on account of the errors assigned, the following, and no other, papers or records:

First.

The stipulation of attorneys as to the facts and that the above action and five other actions, to-wit:

The New Hampshire Savings Bank and P. J. Conklin, Appellants,

vs.

The Jackson-Walker Coal & Material Company, Appellee.

9 The New Hampshire Savings Bank and P. J. Conklin, Appellants,

vs.

J. C. Titus and J. H. Higley, partners as The Titus-Higley Lumber Company, Appellee,

The New Hampsihre Savings Bank and P. J. Conklin, Appellants,

vs.

The Home Builders Association, Appellee.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,

vs.

A. S. Orr, doing business as The North End Hardware Company, Appellee.

The New Hampsihre Savings Bank and P. J. Conklin, Appellants,

vs.

The Haines Tile & Mantel Company, Appellee.

may be tried together and that the appellants may print one record for use in the Appellate Court.

Second.

The following pages and lines in the Certificate of C. V. Ferguson, Referee, filed June 18th, 1913, to-wit: Pages 1, 2, the first 12 lines of page 3, the nine bottom lines on page 11, the first 25 lines on page 12, the 6 bottom lines on page 13 and all of page 14. The evidence pertaining to the Waco Avenue property from page 339 to page 514, inclusive, in the record now in your office, in re: Charles Bron, a Bankrupt, No. 585, being the testimony introduced before the Referee filed April 15th, 1913, being all of the evidence introduced relating to the priority of liens of the appellants and appellees on the Waco Avenue property.

Third.

The memorandum decision of Judge Pollock in the case of Varner and Marshall, doing business as The Wichita Lumber Company, vs. John H. Burns, Trustee, Civil No. 172, on the petition to revise, filed on behalf of G. F. Varner and W. E. Marshall, partners as The Wichita Lumber Company, this being the petition to revise in which Judge Pollock filed a full and complete memorandum and the other opinions were based on
10 the decision in this case of Varner and Marshall, doing business as The Wichita Lumber Company; also, the petition to revise, filed by Varner and Marshall, doing business as The Wichita Lumber Company, in regard to the Waco Avenue property (but not the exhibit attached thereto) being the order establishing lien priorities.

Fourth.

The judgment and final decree of Judge John C. Pollock in the United States District Court in the above action, filed October 1st, 1913, in the above proceeding of Varner and Marshall, doing business as The Wichita Lumber Company, vs. John H. Burns, Trustee, Civil No. 172, in regard to the Waco Avenue property.

Fifth.

The petition for the appeal, the assignment of errors, the

bond given and the order allowing the appeal in the above proceeding of Varner and Marshall, doing business as The Wichita Lumber Company, vs. John H. Burns, Trustee, Civil No. 172.

Sixth.

The notice of election to take the appeals up under the act of February 13th, 1911, filed in the proceeding of Varner and Marshall, doing business as The Wichita Lumber Company, vs. John H. Burns, Trustee, Civil No. 172.

Counsel for appellants state that they are of the opinion that they have noted all the necessary record to properly review the above appeals.

Dated October 28th, 1913.

THE NEW HAMPSHIRE SAVINGS BANK,
By Kos Harris & V. Harris, Its Attorneys.

J. P. CONKLIN,
By Holmes, Yankey & Holmes, His Attorneys.

11 Wichita, Kansas, October 28th, 1913.

Received of Kos Harris & V. Harris and Holmes, Yankey & Holmes, a duplicate of the above and foregoing Precipe for Record in the above entitled action.

BRUBACHER & CONLY,
Attorneys for Varner & Marshall, & The Haines Tile & Mantle Co.

BRUBACHER & CONLY,
Attorneys for A. S. Orr, as North End Hardware Company.

GEORGE GARDNER,
Attorney for The Home Builders Association and The Jackson-Walker Coal & Material Company.

A. V. ROBERTS,
Attorneys for The Titus-Higley Lumber Company.
Signed for receipt of copy only.

A. V. ROBERTS,
Filed in the U. S. District Court Oct. 30, 1913.

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12 In the District Court of the United States for the District of Kansas, Second Division.

In the matter of Charles Bron, Bankrupt.
In Bankruptcy No. 585.

CERTIFICATE BY REFEREE TO JUDGE.

Pages 1, 2, the first 12 lines of page 3)

I, C. V. Ferguson, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings

in said cause before me, the following question arose pertinent to said proceedings:

John H. Burns, trustee of Charles Bron, bankrupt, filed his petition praying that the proofs of debt secured by either mechanics liens or mortgages be reconsidered, rejected and reduced and the question whether they were secured claims and that the amount and extent of the security be determined.

Prior to January 3rd, 1911, the creditor Conklin was the owner of, and occupied as his homestead, the following descriped property:

> Beginning 206 feet north of the northeast corner of Lot 111 on Waco Avenue in the original town of Wichita, Sedgwick County, Kansas, running thence west 200 feet, thence south 48 feet, thence east 200 feet, thence north 48 feet to the beginning.

On that date Conklin conveyed this property by deed to Charles Bron, the bankrupt, in payment for which he received a mortgage from Bron for $4500.00, which, it was agreed between the parties, should be a second lien to a mortgage of $7500.00 which was to be and was executed on that day by Bron to E. D. Kimball, and which was afterwards assigned to

The New Hampshire Savings Bank and by it presented in
13 this estate. The deed and both these mortgages were duly recorded on the 3rd day of January, 1911.

At an early hour of January 3rd, 1911, Bron entered upon the premises with laborers and did an hour or two's work toward excavating for the foundation of a building which was to be erected on the premises. Soon after this various parties furnished labor and material in and about the erection of improvements, for which they filed mechanics liens, presented herein as secured claims.

The property was sold free from liens, and all liens transferred to the funds arising from the sale of said property.

The question of the amount and the security of these respective claimants was established as follows:

Secured by mortgages:	
No. 19, New Hampshire Savings Bank	$8,312.50
No. 45, P. J. Conklin	5,218.00
Secured by mechanics liens:	
No. 34, Carl Graham Paint & Wall Paper Co.	218.78
No. 28, Titus-Higley Lumber Co.	216.70
No. 12, Home Builders Association	134.55
No. 38, Chas. E. Mahaney	117.18
No. 41, A. S. Orr, as North End Hardware Co.	299.72
No. 7, Frank Hoff	964.04
No. 49, Dave & V. E. Johnson	143.44

No. 13, Jackson & Walker Coal & Material Co..... 1,029.45
No. 26, Geo. T. Steel 107.63
No. 31, Haines Tile & Mantel Co. 1,521.20
No. 15, Wichita Lumber Co..... 3,145.81

And the further question arose: Which of the respective claimants was entitled to the first, second and third lien on the funds. And it was determined that the lien created by the mortgage from Bron to Kimball and assigned to the New Hampshare Savings Bank vested immediately upon its execution, delivery and record and was a first lien on the premises; and the mortgage to Conklin, by agreement between the parties, created a lien upon its execution, delivery and record and was a
14 second lien on the premises; and the creditors having mechanics liens, which were co-equal, were entitled to a third lien, without preference to any one of them, their liens not having precedence over the mortgages, the actual beginning of the building not having been commenced until after the third day of January, 1911, the work done by the bankrupt on that day being fraudently done by the bankrupt for the purpose of giving preference, over the two mortgages, to any mechanics liens to be thereafter created and established.

And the further question arose whether or not the mechanics lien claimants were entitled to a first and prior lien on the improvements put upon the real estate by them, independent of the real estate without the improvements, and it was determined that they were not entitled to a first and prior lien on the improvements separate from the real estate.

* * * * * *

(The nine bottom lines on page 11, the first 25 lines on page 12)

It is further ordered that the following named creditors are entitled to and have a first lien for the amount of their claim secured by a mortgage allowed herein and to the funds arising out of the priperty heretofore sold free of liens as follows, to-wit: A tract of land beginning 206 feet North of the N. E. Corner of Lot No. 111 on Waco Street in the original town of Wichita; thence west 200 feet; thence south 48 feet; thence east 200 feetl thence north 48 feet to the place of beginning in the city of Wichita, Sedgwick County, State of Kansas: The claim No. 19, New Hampshire Savings Bank, Concord, New
15 Hampshire is entitled to and has a first lien and the funds arising out of the property herefore sold free of liens for $8,312.50. Claim No. 45, P. J. Conklin has a second lien on the last above described property for $5,218.00.

And it is further ordered that the following named creditors are entitled to and have a third lien and equal without preference to any of them for the following amount of their respective secured claims and the funds arising out of the sale of property heretofore made free of liens, as follows and in the following amounts on the said above described property, to-wit:

No. 34	Carl Graham Paint & Wall Paper Co.	$ 218.70
No. 28	Titus-Highley Lumber Co.	261.70
No. 12	Home Builders Association	134.55
No. 38	Charles E. Mahaney	117.38
No. 41	A. S. Orr as North End Hardware Co.	299.72
No. 7	Frank Hoff	964.04
No. 49	David & V. E. Johnson	143.44
No. 13	Jackson-Walker Coal & Material Co.	1,029.45
No. 26	George T. Steele	107.63
No. 31	Haines Tile & Mantel Co.	1,521.20
No. 15	Wichita Lumber Co.	3,145.81

* * * * * *

(The 6 bottom lines on page 13 and all of page 14.)

It is further ordered that in all the above claims so allowed, based on either mechanic's liens or mortgages interest has been calculated to the date of the sale of the property and said claims or any of them shall bear interest thereafter. And this, as to the said interest, is entered upon the unanimous consent in open Court by all claimants in interest herein.

And it is further ordered at the request and upon the unanimous consent by all the claimants and creditors of this estate, that there be taxed and paid out of the funds arising from
16 the sale of the above named tracts, sold by the trustee herein free of liens to satisfy the respective accounts allowed herein as secured claim, the following items of cost to the following named persons and for the amounts stated, to-wit:

To B. Noyes, five days reporting $5 per day	$ 25.00
Transcribing 120 pages testimony	33.00
To Sylvia Rhinehardt one day reporting	5.00
Transcribing testimony	2.75
To Alfred Alling, 9 days reporting, $5 per day	45.00
Transcribing 366 pages testimony	95.15
To Carrie Pflugshaupt, 3 days reporting $5	15.00
Transcribing	6.00
Certified copy of this order to trustee	2.00
To Edith McDonald one day reporting	5.00
Transcribing	2.75
A total sum of	$236.65

and be apportioned and charged to the funds arising from the sale of the respective pieces of property pro rate.

Done at Wichita, Kansas, this 27th day of January, A. D. 1913.

(Signed) C. V. FERGUSON,
Referee in Bankruptcy.

Filed in the U. S. District Court June 18, 1913.

TESTIMONY BEFORE REFEREE.

(Pages 338 to 514 Inclusive).

17 November 19, 1912.

In the Matter of The Estate of Charles Bron, No. 585.

Hearing upon the several applications of secured creditors for the establishment of priorities of the respective claimants, to-wit, Mechanics Liens, Mortgages, and other incumbrances, whose several claims have heretofore been examined and allowed herein.

The following evidence was introduced in respect thereto:

. . . . . .

Hearing with reference to priorities on the property known as the Waco Street flats, more particularly described as follows: A tract of land beginning 206 feet north of the northeast corner of lot No. 111, on Waco Street, in the Original Town of Wichita, thence west 200 feet, thence south 48 feet, thence east 200 feet, thence north 48 feet to the place of beginning, in Sedgwick County, Kansas.

. . . . . .

STIPULATION.

Counsel representing the mechanics lien holders and counsel representing the mortgage lien holders, respectively stipulate and agree in open court, as follows:

That there is recorded in the office of the Register of Deeds of Sedgwick County, Kansas, what purports to be the copy of a warranty deed from Florence A. Merrill, and husband, A. H. Merrill, to Laura Conklin, consideration $1,600, dated March 22, 1897, acknowledged March 22, 1897, filed for record April 4, 1902, on the following described real estate in Sedgwick County, Kansas, covering the property above described with other property, to-wit:

Commencing at a point 56 feet north of the north-east cor-
18 ner of lot 111 Waco Street, original town of Wichita, Kansas, as a place of beginning; thence north along the west side of Waco Street, 150 feet, thence west to the river; thence along the west bank of said river in a southerly direction to a point directly west of the place of beginning; thence east to the place of beginning; and that said deed is recorded in said office in book 193 at page 117.

Also that in book 268 at page 116 of deeds, in the office of said register of deeds, appears what purports to be a copy of a warranty deed from Laura Conklin and husband P. J. Conklin, to Charles Bron, consideration $4,500, date December 31, 1910; acknowledgment January 3, 1911, before A. O. Conklin, notary public, of Sedgwick County, Kansas, filed for record January 4,

1911, at 11:40 o'clock A. M. covering the tract of ground first hereinbefore described.

It is admitted that by said deed last mentioned Laura Conklin transferred the title to the property first described to Charles Bron.

Also it is agreed that book of mortgages 222 at page 139 in the office of the register of deeds of Sedgwick County, Kansas, contains what purports to be a mortgage from Charles Bron and Anna Bron to E. D. Kimball, for $7,500, dated January 3, 1911, acknowledged January 4, 1911, before P. C. Sargent, a notary public, of Sedgwick County, Kansas, filed for record January 4, 1911, at 12:10 o'clock P. M., covering the property first hereinbefore described, and being the mortgage set up by the New Hampshire Savings Bank as a lien upon said property. Said $7,500 mortgage being payable in four notes due January 1, 1916, January 1, 1913, January 1, 1912, and January 1, 1912; with interest at 6% payable semi-annually from the date thereof.

Also there appears in the office of the Register of Deeds of
19 Sedgwick County, Kansas, in book 225, on page 609 of the mortgage record kept in said office, what purports to be a mortgage from Charles Bron and Anna Bron to A. F. Rowe, for $700, dated January 3, 1911, acknowledged January 4, 1911, before P. C. Sargent, notary public of Sedgwick County, Kansas, filed for record January 4, 1911, at 12:20 o'clock P. M., on the land first herein described; and being the same mortgage by which A. F. Rowe claims a lien upon the proceeds of said property first herein described.

It is also stipulated that in book 225 at page 614 of mortgages in the register of deeds office of Sedgwick County, Kansas, appears of record the a mortgage from Charles Bron and Anna Bron to P. J. Conklin, for $4,500, dated December 31, 1910, acknowledged January 4, 1911, before A. O. Conklin, a notary public of Sedgwick County, Kansas, filed for record January 4, 1911, at 12:30 o'clock P. M. on the tract first herein described, and being the same mortgage which has been allowed as a lien herein and by which the said P. J. Conklin claims a first lien upon the proceeds of said property.

It is also stipulated in said mortgage of $4,500 from Bron to Conklin, it excepts a mortgage of $7,500 dated January 3, 1911, made to E. D. Kimball.

It is admitted that there appears upon the original mortgage for $7,500 proved up by the New Hampshire Savings Bank, the following: "For value received I hereby assign the within mortgage debt together with the debt secured, to the New Hampshire Savings Bank, to the extent of $6,500, as a first lien; March 6, 1911. (Signed) E. D. Kimball." Duly acknowledged before C. A. Gardner, notary public.

Said assignment of March, 1911, has never been recorded in the office of the register of deeds of Sedgwick County,
20 Kansas.

It is admitted that there appears of record in the office of the register of deeds of Sedgwick County, Kansas, an instrument purporting to be an assignment of said $7,500 mortgage to the New Hampshire Savings Bank, and recorded in volume 232 at page 176 of the mortgage records of Sedgwick County, Kansas, bearing date the 26th day of February, 1912, signed by E. D. Kimball, and purporting to be acknowledged on that date, and which was filed for record on the 7th day of March, 1912, at 1:30 o'clock P. M.

It is also stipulated and agreed that the original instruments offered in evidence on the hearing of the claims, as well as certified copies of duly filed and recorded instruments, shall be considered in evidence on the hearing of this question of priorities; the same to cover all notes, mortgages, mechanics liens, certified copies of mechanics liens and statements of account, that heretofore have been received in evidence and allowed by the Referee as a part of the claims against the above described property.

Direct examination of E. D. Kimball, by Mr. Brubacher.

Q. You negotiated the loan of $7,500?—I will withdraw that. You are the gentleman who made the loan of $7,500 to Mr. Bron on the Waco Street property? A. Yes.

Q. And also the loan of $700 made to A. F. Rowe, you negotiated that one? A. That was the commission note for the negotiation of the $7,500 loan.

Q. Have you a book account of the transaction? A. I have.

Q. Will you produce it?

By Mr. Harris: Now, your Honor, I now object to any testimony, on behalf of the New Hampshire Savings Bank,
21 as to the $7,500 note. The notes are here in this court; they have been endorsed and delivered prior to maturity, proved up in the name of the New Hampshire Savings Bank, and any inquiry as to the consideration of that note as between Mr. Kimball and anybody else is incompetent, irrelevant, and immaterial.

By the Court: Objection overruled.

By Mr. Holmes: The mortgagee, P. J. Conklin, objects to the introduction of this method in which it was paid out, as being immaterial, and no notice having been given.

By the Court: Objection overruled.

Q. What page does it appear on?

By Mr. Harris: I object to any further testimony, on behalf of the New Hampshire Savings Bank, at this time, relative to the $7,500 note, as incompeteent, irrelevant, and immaterial, and for the reason that the record does show that the New Hampshire Savings Bank was the owner of the notes prior to the maturity thereof by endorsement.

By the Court: Objection is overruled.

Q. What book have you now? Did you state what page it was, Mr. Kimball, that the account appears on? A. Ledger folio, 289.

Q. Ledger page 289? This ledger was made at or about the time it purports to have been made? A. It was.

Q. And you know it to be correct, do you? A. Yes.

By Mr. Brubacher: The mechanics lien claimants now
22 offer in evidence so much of the ledger of E. D. Kimball at page 289 as relates to the Waco Street transaction, showing the loan of $7,500 which has been proven up as a mortgage lien against that property.

By Mr. Harris: Objected to on behalf of the New Hampshire Savings Bank, A. F. Rowe, and E. D. Kimball, as incompetent, irrelevant, and immaterial; it is not binding on them. I will take Mr. Kimball's separately. Objected to on behalf of the New Hampshire Savings Bank as incompetent, irrelevant, and immaterial, not binding on the New Hampshire Savings Bank by reason of its ownership of the notes and the mortgage offered in evidence here, and the proof heretofore made. Also the same objection on the part of A. F. Rowe. And the same objection on the part of E. D. Kimball.

By Mr. Holmes: The mortgagee P. J. Conklin, objects to the introduction of evidence as incompetent, irrelevant, and immaterial, in so far as he is concerned, and in no way binding him or affecting him.

By the Court: If you say it is preliminary to some matters you want to reach, I will overrule the objection until you demonstrate that proposition.

Exceptions by Mr. Harris and Mr. Holmes.

Q. Mr. Kimball, I notice appearing on your record, Mr. Kimball, a check purporting to bear date January 4, 1911, paid
Bron $750, No. 3573; have you that check before you?
23 A. I have.

By Mr. Harris: We object to that as incompetent, irrelevant, and immaterial, not binding on the New Hampshire Savings Bank, and not binding on A. F. Rowe. For The New Hampshire Savings Bank, A. F. Rowe, and E. D. Kimball.

By the Court: Objection overruled.

By Mr. Harris: To which we except.

By Mr. Holmes: And for P. J. Conklin.

Q. Have you the check before you? A. I have. But there was a mistake about that date.

Q. What date does the check bear? A. January 3, 1911.

Q. So do you know when it was actually given to Mr. Bron? A. January 3, 1911.

Q. And you entered it upon your ledger the day following? A. Some way it was overlooked at that date. It was canceled January 4th; went through the bank January 4th.

By Mr. Brubacher: The mechanics lien claimants now offer in evidence the paper marked Exhibit A.

By Mr. Harris: I object as incompetent, irrelevant, and not binding upon the New Hampshire Savings Bank. Also the same objections on behalf of A. F. Rowe, and the same on behalf of E. D. Kimball.

By Mr. Holmes: The same on behalf of P. J. Conklin.

By the Court: Overruled.

(Counsel reads Exhibit A.)

Q. Had Mr. Bron and his wife acknowledged the $7,500 mortgage when you paid him that $750.

By Mr. Harris: I object as incompetent, irrelevant, and immaterial, in so far as it affects the New Hampshire
24 Savings Bank, for the reasons heretofore stated; and also as to A. F. Rowe, same reasons; also as to E. D. Kimball, same reasons.

By Mr. Holmes: Also P. J. Conklin, same reasons.

By the Court: Objection overruled.

Exceptions by each party.

A. They had. At the same time.

Q. At the same time? How's that? A. It was all done at the same sitting.

Q. Do you understand my question? (Question read.) A. Yes.

Q. I call your attention to the stipulation in the record as shown by the abstract, that the paper was acknowledged on January 4, 1911, before P. C. Sargent. Do you still say that he had acknowledged it? A. Possibly he had only signed it.

Q. You would rather rely upon the record than upon your memory? A. I would.

Q. So if the record is correct, he hadn't signed the note and mortgage—hadn't signed the mortgage when you gave him the $750? A. That might have been so.

Q. Have you a distinct recollection of his coming in the day afterwards and signing up the papers on January 4th?

By Mr. Harris: Object as incompetent, irrelevant and immaterial, not binding on the New Hampshire Savings Bank. Also same objection as to A. F. Rowe, E. D. Kimball, and P. J. Conklin.

25 Q. Or is your memory from what you see on the ab-
abstract?

By Mr. Brubacher: That is a part of my question; Mr. Harris rather broke in on me.

By Mr. Harris: Same objection.

By the Court: Overruled.

By Mr. Harris: Exception.

A. I do not remember the minute details. It is possible that check was mistaken one day in its date, but I think not.

Q. Your day book will show, will it not, Mr. Kimball, from which you made the entries on your ledger? A. The day-book and the stub book will show that.

Q. So if there is any error, you may correct it; I will say that, Mr. Kimball. You have no independent recollection of the details of the signing up of the mortgage further than what you see upon the abstract? A. I do not remember the details.

Q. Do you remember Mr. Bron and his wife signing up the mortgage before Mr. Sargent? A. Yes.

Q. You remember that circumstance? A. Yes.

Q. Now, had you prior to that time given them this $750 check?

By Mr. Harris: We object as incompetent, irrelevant, and immaterial, not binding on the New Hampshire Savings Bank, not binding on the claimant A. F. Rowe, not binding on the claimant P. J. Conklin, incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Exception by each party.

A. I do not remember the details, but think I gave Bron the check when he signed the papers.

26 Q. Nevertheless, if you paid the check on the date that it purports to be drawn, and the papers were exchanged on the date they purport to be acknowledged, you paid the check the day before the papers were acknowledged?

By Mr. Harris: I object as incompetent, irrelevant, and immaterial, not binding on the New Hampshire Savings Bank; also objected to on behalf of A. F. Rowe, same reasons, not binding on him.

By Mr. Holmes: Also for the same reasons on behalf of P. J. Conklin.

By the Court: Objection overruled.

A. I remember this, in one or two cases of which I think this was one, Mr. Bron came in and signed the papers, and his wife came in later and signed them.

Q. You think, therefore, that Mr. Bron may have signed the papers on the 3rd, at which time you gave him the check? A. I think so.

Q. And that on the following day his wife came in and signed the papers, and they both acknowledged on the following day? A. I think that was the case, to the best of my recollection. It happened that way once or twice.

Q. So he was in your office on January 3d? A. I am quite sure that he was.

Q. Have you any distinct recollection as to what time of day he came in?

It is stipulated that the same objections and exceptions are made for each question.

A. I am not sure he was there on the 3d.

(Question read.)

A. I am not sure.

27 Q. You knew from whom Mr. Bron was getting this property, did you not? A. Yes.

Q. From whom did you think he was getting it?

By Mr. Harris: We object to that for the reason that we have got a record right here as to when he got it, and where he got it, and how he got it, and it is admintted.

Q. Now I noticed on this book account—withdraw that. You knew from whom this title was coming to Mr. Bron, did you not? A. I did.

Q. When did he first approach you to negotiate a loan of $7500 upon that property? A. I do not remember.

Q. Can you not approximate it? A. It was talked of in a preliminary way some time before this.

Q. Would you say two weeks? A. Perhaps so.

Q. You know it was under consideration during the holidays previous? A. Yes.

Q. You knew the property was vacant, unoccupied, that is, no buildings on it? A. Yes.

Q. Did you know of any work that Mr. Bron was doing upon the property during the holidays? A. No.

Q. Did you know of any clearing up of the property that was necessary? A. I knew it would be necessary.

28 Q. Had you seen the property before the holidays or during the holidays with a view of making this loan? A. I presume so.

Q. And you saw the condition of the property as to the shrubbery and trees that was upon it? A. Yes.

Q. You knew all that had to be removed before they put the house up, or the flats? A. Yes.

Q. Now, don't you know that he did some work towards clearing off that ground during the holidays? A. No.

Q. When did you see the property last before the papers were acknowledged on January 4th? A. I do not remember.

Q. Can you approximate it? A. No.

Q. Do you distinctly remember of going up and seeing the property with a view of making this loan? A. I went and saw it with a view of this loan, yes.

Q. Did you know that Mr. Bron was not paying anything for the ground that he was buying from Mr. Conklin?

By Mr. Holmes: We object, as in support of a fact not proven.

By the Court: Sustained.

Q. Do you know what Mr. Bron did pay Mr. Conklin for the property? A. I have forgotten, if I ever knew.

Q. To refresh your memory, do you not know that he was paying him $4500 for the vacant ground? A. I think that is right.

Q. So you knew that he was not paying any cash consideration did you not, for the ground? To Mr. Conklin?
29 A. I think I did.

Q. Did you have an agreement with Mr. Conklin as to whether your $7500 mortgage should take priority over the $4500 mortgage? A. I did.

Q. When did you have that agreement? A. I do not remember the date.

Q. How long before your mortgage was acknowledged? A. I do not remember.

Q. Do you remember where you had the agreements? A. I do not. Nor do I remember whether it was directly with Mr. Conklin or Mr. Bron.

Q. You then have no recollection of having any direct agreement with Mr. Conklin that your $7500 mortgage should be prior to the mortgage for the purchase money? A. I think I had, but do not remember the details of the arrangement.

Q. So when and where you had any agreement with Mr. Conklin that your $7,500 mortgage should be prior to his, is not now remembered by you? A. I do not remember the arrangement with Mr. Conklin, but I am quite positive that I conferred with him by telephone as to the details of the recording of those papers on the day they were filed or the day previous.

Q. Did you or did you not talk with him over the telephone prior to that time about your mortgage must be a first lien upon the property? A That was understood either by

direct conversation with Conklin previous to this or by phone or through Mr. Bron, I don't remember which.

Q. And how long had that been so understood? A. From the first.

30 When was that? A. I don't remember.

Q. About when was it? A. Whenever Mr. Bron asked me about the loan, it was proposed to be a first mortgage.

Q. About when was it? A. I don't remember the date.

Q. Would you say it would be as late as December 20th prior? A. I do not remember the date.

Q. I am not asking you, I am asking you if you can approximate it. A. No.

Q. Had any trees been cut down upon the property when you went to look at it? A. No.

Q. Was any trees cut down upon the property to your knowledge prior to the signing up of the mortgage? A. No.

Q. You do not know whether there was or was not? A. I know.

Q. What do you know? A. I know there was no trees cut there till later.

Q. You say there was no trees cut upon the property until after January 3, 1911? A. Yes.

Q. How do you know that? A. I was up there afterwards, a few days.

Q. How long after January 4th? A. The following Sunday.

Q. What day would that be? What day of the month? A. I think it was the 8th.

Q. No work—I will withdraw that. You say no trees had been cut on the property on January 8th. A. No.

31 Q. And no shrubbery removed?? A. No, none that I could observe.

Q. The land was in the same condition on Sunday, January 8th as prior? A. So far as I could discover, it was.

Noon adjournment.

Q. Were you on the land on Sunday, January 8th? A. Yes.

Q. Who with? A. I do not remember.

Q. Were you all over it? A. Not on every inch of it.

Q. But if there had been any cutting of trees or anything like that, you think you would have noticed it? A. I certainly would.

Q. Do you know whether you went with some one or whether you went alone? A. I do no know.

Q. What is there that impresses your mind that you were there on Sunday, January 8th? A. That was my habit to go to buildings which Bron had in process of erection every Sunday when the walking was good. He had a flat approaching completion the second door south of this property, and from the time that he gave this mortgage, I made it a habit in looking at the other property, to look at this too.

Q. So you are testifying now from a habit, or from a distinct recollection of being on the property? A. Both.

Q. Do you have a distinct recollection of going to see the condition of this lot on which these flats were erected on
32 Sunday, January 8th, for that purpose? A. I noticed the condition of the lots, whether there was material there, particularly.

Q. I do not think you understood my question. I ask you if you have a distinct recollection of going there for the purpose of seeing the condition of the lots on January 8th? A. Yes.

Q. Or did you come to see the condition of the flats? A. Both.

Q. And you think you saw the condition of the lots? A. Yes.

Q. You don't recall whether any one was with you? A. No.

Q. You don't recall whether Mr. Conklin or any member of his family was there? A. I don't remember as to that particular day because when over there I frequently saw Mr. Conklin but not always.

Q. In drawing up your $7500 and your $700 mortgage, did you make the $700 mortgage a second mortgage to the $4500—a third mortgage, or a second mortgage? A. I do not remember.

Q. You took the deeds and the mortgages to the court house to record, did you not? A. It is my recollection that Mr. Sargent took them to the court house.

Q. They were taken from your office? A. They were.

Q. The deed from Conklin to Bron, and also the mortgage from Bron to Conklin? A. No, not the mortgage from Bron to Conklin. It is my recollection that I phoned Mr. Conklin that that mortgage was ready to record and I would like to have his deed go on record, and if agreeable to him I
33 would let Mr. Sargent go over and get it—

By Mr. Brubacher: I move to strike that out, your Honor, as not responsive to the question.

By the Court: Sustained.

A. Yes, and no.

Q. Then, if I understand you correctly—. A. The deed yes, and the mortgage no.

Q. The deed was taken by Mr. Sargent for your office, and the mortgage not? A. The deed was taken by Mr. Sargent. The mortgage, if I remember, was not taken from my office.

Q. When did you get the deed from Conklin to Bron? A. Just before Sargent took them to the court house.

Q. You have a distinct recollection of that, haven't you? A. Of phoning to Mr. Conklin, I have a distinct recollection.

Q. I notice Mr. Kimball, on your ledger, under date of April 19th, the charge of $800. What is that? A. That ap-

pears to be on account of a loan numbered 1108.

Q. What property was that on? A. I think that was Mr. Bron's unsecured note of hand, if I remember rightly. I should have to refresh my memory by consulting my record to be sure of it.

Q. Is that correct, Mr. Kimball? A. It was an unsecured note.

Q. I hand you note marked Exhibit B, and call your attention to a credit on the back of it, and will ask you if that is the note on which the $800 was paid that appears in your ledger account as going to make up a part of the $7,500 on the Waco property? A. The $800 on this note was paid by a charge
34 against the Waco property. This Waco Avenue loan.

Q. Then the $800 that appears of date April 19th on your ledger did not supply any material to go into the—I will withdraw that. I will ask you what Exhibit B was given for. A. Money lent to Charles Bron.

Q. When? A. On the 15th day of March, 1911.

Q. The date the note bears credit—I mean the date of the note? A. The date of the note.

Q. Then Exhibit B was not secured? A. Exhibit B was not secured.

By Mr. Brubacher: We offer in evidence Exhibit B, your Honor, with the endorsements thereon.

By Mr. Harris: We object as incompetent, irrelevant, and immaterial, not binding on the New Hampshire Savings Bank, and not binding on the claimant A. F. Rowe. Same objection as to P. J. Conklin and E. D. Kimball.

By the Court: The objection will be overruled for the present.

Q. Was the $3,800 note introduced in evidence finally paid in the settlement of your account? A. I think it was.

Q. How's that? A. It was paid, as I remember it.

Q. Now I notice under date of January 8th—28th, a charge of this fund of $7,500 of $170.25; what was that for? A. That was for money which Mr. Bron had received which was previously charged to another loan to balance.

Q. So that item of $170.25 is like the $800 item—?
35 A. Bron had the money for it.

Q. It was no money to your knowledge that went into these flats? A. I furnished Mr. Bron the money—

By Mr. Brubacher: I move to strike that out, your Honor.

By the Court: The objection will be sustained.

Q. That $170 was an overdraft that Bron had drawn on the Emporia flats more than the loan, wasn't it? A. Yes.

Q. And the Emporia flats were your own individual property? A. No.

Q. What flats were they A. Mr. Bron's.

Q. I notice under head of February 20, 1912, a charge against this—that went to make up this item of $7,500 loan, a charge of $120.84; what was that? A. That was credited to Mr. Bron's general account.

Q. What do you mean by that? A. Well, I had an open account with Mr. Bron; he had a way of going to the court house and getting an abstract and asking them to bring the bill to me, and I kindly paid it, and other funds of various sorts of work, I accommodated Mr. Bron.

Q. So that charge is for claims of that character? A. It is.

By the Court: Did they pertain to this property? A. Miscellaneous properties.

Q. Can you tell us, Mr. Kimball, what the item of $120—I will withdraw that. Kindly explain again in more detail what that charge of $120.84 is, whether it pertains to this Waco Street property? A. It was agreed between Mr. Bron
36 and I—

By Mr. Brubacher: I move to strike that out, what was agreed to.

By Mr. Harris: We insist, your Honor, that any agreement between Mr. Kimball and Mr. Bron as to the disbursement of these moneys is entirely proper.

By the Court: If he knows what these items are, he may state.

A. I should have to run through the account and tell you what the items were.

Q. Now, have you ascertained, Mr. Kimball, what goes to make the $120 item? A. I find one item here that mentions this particular property, only 50c.

Q. Is that 50c in the $120.84 charged? A. I can't separate the credits on that account.

Q. Can you tell the court what that charge of $120.89 was for? A. It was to produce a credit on Mr. Bron's general account.

Q. For him to check on or to come to you and get the money whenever he wanted it? A. He had gotten the money.

Q. He had already gotten the money? For what purpose? A. Miscellaneous purposes.

Q. On what loan did you make it, if you made it on any, when he got the money? A. I find an item of 55c.

By Mr. Harris: We object to that. Let him look that up tonight.

Q. You will look that up, Mr. Kimball, and tell us what the charge of $184.20 was. A. I told his honor it was a gen-
37 eral account.

Q. Now, I will ask you this. Was any part of that $120.84, do you know whether or not it did go into the Waco flats? A. Some did.

Q. How much? A. I don't know.

Q. Will you find out tonight and give us that information? A. Yes.

Q. There is also an item of $50 there, is there not, for a commission? A. Yes, this countercharge.

Q. What is that commission for $50 for? A. It was paid the parties that took this loan for their trouble in making exchange for this loan for the Emporia Avenue loan.

Q. I do not understand. A. We asked them to release.

Q. Asked who? A. The New Hampshire Savings Bank that took this loan formerly held a loan on the Emporia property. I asked them to take this loan and release that one. We paid them $50 for their trouble.

Q. Mr. Bron paid that? A. Yes, I think so, according to agreement.

Q. Of course you paid it to the New Hampshire company and charged it up to Bron? A. Yes.

Q. When was that paid? A. They had credit for it in amking a settlement in March— I got the funds March 9, 1911. March 9, 1911, was the date of the entry on both sides.

Q. And these two small items there I notice under date of January 4th, $2.50 and $1.10? A. These were recording
38 fees paid at the court house in connection with this title.

Q. Mr. Kimball, I believe you stated in your previous— in answer to a previous question, that the matters contained in the account that has been introduced in evidence were correct? A. Yes.

Q. And were made at or about the date the transactions purport to have taken place? A. At or about the date.

Q. That the transactions took place? A. Yes.

DIRECT EXAMINATION OF CHARLES BRON, JR., by Mr. Holmes.

It is stipulated that the same objections are made to this witness' testimony as to that of Mr. Kimball.

Q. You may state your name to the court. A. Charles L. Bron.

Q. Are you a son of Charles Bron, the bankrupt? A. Yes sir.

Q. Did you have charge of the work on the Waco Street property? A. Yes sir.

Q. You had charge of it as it progressed, did you? A. Yes sir.

Q. Do you know when the loan with Kimball of $7,500 was made on the property, about the time? A. Yes sir.

Q. Do you know when the condition of the property in question on Waco—when you first began to clear it up? A. Yes sir.

Q. You may state, Mr. Bron, when the work was first begun— I will withdraw that question. What was the con-
39 dition of the premises when you first begun doing any work on it? A. Why, we had to clear it first; there was some trees and grapevines, and lots of shrubbery.

Q. Now, when did you begin the work to clear the premises? A. Right after the holidays, between Christmas and New Years.

Q. That would be during the holidays? A. During the holidays.

Q. What was done at that time? A. There was some trees chopped down and I staked it out.

Q. What trees were cut down at that time? A. Why, there was several of the trees.

Q. Could you give the court approximately the dimensions of the large trees?

By the Court: Is it your contention that the removing of the trees were a part of the construction of the building?

By Mr. Brubacher: It may be under certain circumstances. I think it is in this case here.

By the Court: I think it is immaterial.

Q. You say some trees were cut down? A. Yes sir.

Q. In cutting those trees down, and removing them, were they grubbed out? A. There was one tree that was.

Q. Now when was that work donw? A. That was on Tuesday following Christmas.

Q. When did you stake out the property? A. The same day.

By the Court: The objection to that question will be sustained.

Q. Do you know when the—Aside from the grubbing out
40 of the trees that you have spoken of, when the first work was done toward excavating the cellar? A. Yes, sir.

Q. When was that? A. That was on January 3d, a little after 8 o'clock.

Q. Who was with you? A. Mr. Underwood.

Q. Who was Mr. Underwod? A. He was the excavator.

Q. Had you let the contract to him? A. To him and Mr. Jones together.

Q. To do what? A. To do the excavating.

Q. Who did this cutting down of trees and the grubbing of them out?

By the Court: Objection sustained.

By Mr. Brubacher: The mechanics lien claimants now offer to prove by this witness that as a part of the contract of Underwood and Jones to excavate for the building of the flats

in question they were to cut down the trees and remove the same from the premises.

Q. What was the dimensions of the flats? A. 36 by 76

Q. Now, were these trees that you speak of on the part of the premises where they were excavating for the cellar? A. There was one big tree and I think two or three of the smaller trees.

Q. And that big tree that you claim was cut down and grubbed out was during the holidays? A. Yes sir.

Q. And who did that work? A. Mr. Jones and Underwood.

41 Q. And who were they. A. The excavators.

Q. They were the parties who had the contract to do the excavating there for these flats? A. Yes sir.

Q. Was that a part of their duties under the contract?

By the Court: Objection sustained.

Q. Was the contract in writing? A. No sir.

Q. What was the contract? A. The contract was that they were to excavate the basement and to haul part of the dirt down to the river for 35c a yard.

Q. Did you pay them anything extra for the cutting down and grubbing out of this tree? A. No sir.

Q. Where was that big tree that you speak of? A. That was in the cellar part.

Q. The cellar part? A. Yes sir.

Q. Was it near the wall? A. Yes sir, I think if I am not mistaken, it was near the east wall.

Q. Now when did you let the contract to Jones and Underwood to do this excavating?

By Mr. Harris: We object as—

By the Court: Objection overruled.

A. We spoke to them three weeks before this time, I think, the first time, and we were going to start right
42 away, but there was some trouble, and I do not remember now, it was either with a mortgage or a deed of Mr. Conklin, he couldn't get it as soon as he wanted, and we couldn't very well start up before we had the deed. Mr. Kimball didn't have it.

By the Court: That answer will all be stricken out as not responsive to the question.

Q. I believe you said 3 weeks before— A. That was when we first spoke to Jones and Underwood about it; we said we would have the job for them and just as soon as we could get in shape they should have the work. The original contract wasn't let till just about Christmas.

Q. You say—What work now, was there done on January 3d? A. Mr. Underwood came there and he started to pick, he had to pick all the top off, and load it in the wagon, and haul

it down to the river, and he came there shortly after 8 o'clock, and we had to re-stake it—I didn't have the stakes correct, I had them in this brush, and we re-staked it, and I think he hauled one or two loads down to the river and he said it was so cold he wouldn't work, and he quit.

Q. What was the condition of the weather? A. It was very cold.

Q. When was the next work done? A. The next work was done the next morning.

Q. When did you begin work there on the 3d? A. In the morning.

Q. When? A. Right shortly after 8 o'clock.

Q. What time did you begin work on January 4th. A. Eight o'clock.

43 Q. Who was there? A. Mr. Underwood came there first, and about a quarter to 9, I think it was, Mr. Jones came.

Q. That is the co-contractor? A. Yes sir.

Q. Now, how long did you work that day? A. We worked all day.

Q. What was the—could you use the shovel or the plow at that time? A. No sir.

By the Court: Is it your contention that those who have no claims fix the date that these lienholders claim from?

By Mr. Holmes: We think it dates from the actual commencement of the building.

(Question read.)

A. No, they had to pick it.

Q. You say they worked all day on the 4th? A. On the 4th, yes sir.

Q. And on the 5th, did you work? A. Why on the 5th they were—I think there was two more fellows that came there to help them.

Q. Who were they, Charley, do you know? A. I think it was Mr. Jones' boy, one of them,—I think Mr. Jones didn't come on the 5th.

Q. Who was the other party, do you know? A. I don't know.

Q. Did you work on the 6th and 7th? A. Yes sir.

Q. Did you make they any payment on the 7th? A Yes sir.

By the Court: Gentlemen; is it conceded that when the
44 building was commenced, all lien-holders date from the date of the commencement of the building?

By Mr. Harris: We concede that when the building is really commenced, that every mechanics lien holder that dates after that, dates back to the date the building was commenced.

By th Court: Proceed with your examination.

Q. I hand you what purports to be a check marked Exhibit C, No. 170, and will ask you to state what that check was given for. A. That check was given for excavating on that soil. I marked it for that.

By Mr. Brubacher: We offer in evidence, now, your Honor, the check.

(Counsel reads check.)

By Mr. Harris: You haven't got this right yet.

Q. What is that, Charley? A. That is 901, it was before they had a number established on that.

Q. Was that check given on that date that it bears, January 7, 1911? A. Yes sir.

Q. And is it now in the same condition that it was when you gave it? A. Yes sir.

Q. That 170 was put on by some one else? A. Yes sir, by Mr. Buckley.

Q. Where has this book been? A. Buckley had them; I turned them over to him.

Q. When? A. Right after father went into bankruptcy.

Q. And he was your father's attorney? A. Yes sir.

45 Q. You say the contract with Jones and Underwood was 30c a yard. A. 35c a yard , and they were to haul the dirt back to the river; these lots were 500 and some feet,—it is over 300 feet.

Q. When were they to get their pay under your contract? A. Why, they were not entitled to any pay until the job was completed.

Q. Did you pay them any on account? A. Yes sir.

Q. Do you know what day of the week January 7th was? A. On Saturday.

Q. Did you pay them any money on the following Saturday? A. Yes sir.

Q. Do you know how much you paid them? A. $50.

Q. Will you turn to the check?

By Mr. Brubacher: We offer in evidence Exhibit D.

Objections by Mr. Harris and Mr. Holmes overruled.

(Counsel reads check.)

Q. Did you personally write these checks? A. Yes sir.

Q. This check wasn't given a week after the other I notice; is that correct? A. That was given a week after; I done that lots of times, dated them for the next Monday.

By Mr. Brubacher: We also offer the endorsement appearing on Exhibit D.

46 CROSS EXAMINATION, by Mr. Holmes.

Q. Mr. Bron, do you recall about the month of December of this last year, 1911, my coming into your office in respect to this matter and seeing you? A. I think so.

Q. Did you not at that time tell me that the Market Street property, that the liens were bad because the building was started before the mortgage was given? A. I might have.

Q. Do you remember telling me we were ahead on this Waco Street property? A. Not Waco; I might have said on all the jobs.

Q. That we were ahead on all? A. That we were ahead.

Q. That is, you and your father were ahead? A. What do you mean by that?

Q. I mean you and your father hadn't started before any papers were filed of record. Did you not just now say on direct examination that you held back on account of the fact that Mr. Kimball didn't want you to do anything before the deed was made? A. Yes, I said that we didn't want to start until we had the deed, until we owned it.

Q. And that is what you did this time? You didn't start until after you owned the property? A. I started it the same morning.

Q. Do you know when the deed was gotten? A. Yes sir.

Q. What day. A. On the 3d.

Q. At what hour of the day? A. I couldn't say that.

47 Q. And were the mortgages made on the same day? A. I don't know about that.

Q. Did your father get this deed, or did you? A. My father.

Q. Then you are going by your impressions as to when your father got it, or did you see the deed? A. I am going to what my father told me when he got home.

Q. Then as to when the deed was received you are going entirely as to what your father said? A. Yes sir.

Q. Your idea is that on the day that your father brought the deed home you started the next morning to work? A. He didn't bring the deed home.

Q. On the evening your father said the deed had been delivered? The next morning, you started the next morning to work? A. No sir, we started that the morning of the 3d, the same day that he got the deed.

Q. Did you start on the morning—How cold was it? A. It was pretty cold.

Q. How cold, give us an idea. A. It was around zero.

Q. Was it any windy? A. I do not know.

Q. Was it your impression that it was colder than that? A. It was pretty cold, I know that.

Q. Was the ground hard? A. Yes sir.

Q. Very hard? A. Yes sir.

Q. Was it ten below zero? A. I do not know; I do not

48 think it was as cold the 3d as on the 2d; I sat watching the fire.

Q. You think it was colder next morning or warmer? A. I think it was warmer the next morning.

Q. Mr. Bron, did you work on that yourself? A. I was there every day.

Q. Did you work? A. I staked it out.

Q. Did you work on the excavation yourself? A. I did not.

Q. The men that worked on it were Jones and Underwood? A. Jones and Underwood, and a couple of other fellows.

Q. But they came in later on the job? A. Yes sir.

Q. You didn't pay them in accordance with the work they done, but to complete the job? A. Yes sir.

Q. So whether you paid them $15 on the 7th, that was not material as to what work they had done and as to whether any had been done? A. I asked Mr. Underwood here what he wanted, and he said $15.

Q. Is it not a fact that it was your custom with Mr. Jones and Underwood to simply pay them when they wanted money? A. Yes, we paid on Saturdays sometimes, on up to the middle of the week, if we had it.

Q. The $15 was simply to apply on the job? A. Yes sir.

Q. The $50 wa simply to apply on the job? A. Yes sir.

Q. Did you pay any more afterwards from time to time that was simply to apply on the job? A. Sure.

49 Q. It made no difference what amount of work they had done, but the amount they asked for? A. It was the amount of 35c a yard for excavating, and we couldn't tell how much they had coming until we got done with the cellar.

Q. Do you recall, Mr. Bron, the breaking of that sewer? A. Yes sir.

Q. What day was that? A. The plumber came there on the morning of the 11th.

Q. Was that broken sewer broken when they were plowing up the ground for excavation? A. No sir.

Q. It was not? A. That cellar was practically dug when they hit that sewer.

Q. I want to make it clear what I mean. I am not referring to the time when the water broke, that is, the water pipe broke in the cellar—not referring to that time, but referring to the time the sewer was broken just when they had begun plowing. I want to make this date clear to you.

Mr. Brubacher: We object as assuming a fact not proven.

By the Court: Overruled.

A. They didn't break into the sewer until nearly done.

Q. How near was that sewer to the surface? A. I should judge about 14 or 15.

Q. Was that sewer necessarily disturbed in digging the excavation? A. No sir. It was when they put in the runways. I will explain that to you. The cellar was 38 feet wide and 36 feet long. This sewer ran right at the west end of the cellar.

Q. Did you know it was there when they began plowing?
50 A. Yes sir.

Q. You knew it was there when they began plowing? A. Yes sir; we didn't fine that when they dug the cellar, until we got to the runways.

Q. How many horses did you have up there? .A. Two teams.

Q. What did they have besides the teams? A. They had plows, picks, shovels, wagons.

Q. They had all those? A. Yes, they took them with them.

Q. It must have been rather warm if they took them along, wasn't it? A. Well, they couldn't use them when they started, but as soon as they got through the frozen ground they used the plows.

Q. How deep was the ground frozen? A. It wasn't froze over about 6 inches.

Q. Now, let me ask you, Mr. Bron, did you begin any plowing the first day you were there? A. No sir.

Q. Did you begin any plowing the second day you were there? A. No sir.

Q. Did you begin any plowing the third day you were there? A. I think they started in the afternoon of the third day, I think they began plowing.

Q. They used a pick? A. Yes sir.

Q. Instead of plowing for the excavation? A. Yes sir.

Q. Now you are sure of that? A. Yes sir.

Q. Let me ask you how far is that from Mr. Conklin's
51 house? A. The cellar wasn't over 15 feet from their kitchen.

Q. Is there not a large window on the north side of the kitchen? A. Yes sir.

Q. Does that not overlook the exact place where the cellar is? A. Yes sir.

Q. Is there not a large window in front of the dining room? A. Yes sir.

Q. And doesn't that overlook the excavation? A. Yes sir.

Q. Do not those windows come down to the bottom? A. Yes sir.

Q. Have you any memorandum, Mr. Bron, by which to refresh your memory? A. No, I know—

Q. I asked, yes or no. A. I have this memorandum.

Q. Answer yes or no. A. Yes sir.

Q. Did you not tell me that you didn't have any memorandum by which you could refresh your memory on that? A. I don't think so; I might have.

Q. You might have? A. Yes.

Q. As a matter of fact, did you not say that the excavation wasn't started until some days after the deal was closed? Did I not tell you the exact date on which the deal was closed. A. No sir.

Q. You didn't? A. I knew that date before that.

Q. I ask you again, did I not tell you also? A. I do
52 not think you did; I don't remember.

Q. Did I not talk with you some length of time about that? A. You were up in the office talking with my father, and I; I remember that.

Q. Did you not say at that time that the mortgages were all right on the Waco property? A. No sir.

Q. Did you not tell me at the time that it was true that the building was started before the loans—before the mortgages were given? A. I never expressed my opinon on that to anybody; I didn't think it was anybody's business.

Q. You didn't think that when your father gave Mr. Conklin a mortgage for $4500, that it was his business to inquire? A. If it was, he knew where to inquire.

Q. What? A. If he wanted to know anything, he could find it out.

Q. Were you dodging? A. No sir.

Q. Were you keeping that dark, or not? A. Mr. Conklin never asked me.

Q. You and I talked on that basis, did we not? A. I do not think that we—you come up there and asked when that job started.

Q. Yes, I asked you at that time, did I not? A. I don't think I gave you any satisfaction—I know I didn't.

Q. Suppose you did tell me at that time a different thing than what you are telling now, were you telling the truth then or now?

By Mr. Brubacher: We object as argumentative.

By the Court: Objection sustained

Q. What do you mean by saying you didn't give me any
53 satisfaction? A. Why, because I didn't think it was any use telling things until some time maybe you had to.

Q. Have you ever told anything about what you are testifying to to these others A. No, I haven't talked much about it.

Q. Haven't you gone over it two or three times? A. The only man I ever spoke to about this is Mr. Brubacher.

Q. You have told the whole matter to him? A. Yes sir.

Q. Now, Mr. Bron, that was a very wise proceeding, was it, to begin the excavation when the ground was frozen?

By Mr. Brubacher: We object as argumentative.

By the Court: Sustained.

Q. Do you recall the fact that the water pipes burst in the cellar at that time? A. There was no water—

Q. Answer yes or no. A. It was for the concrete.

Q. Answer my question; do you recall the fact of the water pipe being broken? A. Yes sir.

Q. Did it not flood the cellar? A. No sir.

Q. It did in part? A. There was some little water in the basement; it drained mostly from each side.

Q. Was there water in the sewer? A. There was no water in the sewer.

Q. None at all? A. Just as soon as we hit that sewer we had to stop until the plumber came (?) because all the houses on the block north were connected onto this sewer.

54 What time of the day was it you hit that sewer? A. It was on the 10th.

Q. What time of day? A. That was in the afternoon.

Q. What time? A. Along about 3 o'clock.

Q. Wasn't that while you were plowing for the excavation? A. No Sir.

Q. Was that not when the horses were dragging a plow across the foundation? A. When we broke into that sewer was,—

Q. Just answer yes or no. A. When we started—

(Question read).

A. Not in the sewer.

Q. The foundation of the cellar? A. No, not in the cellar.

Q. You remark just now that you and your father were always ahead, something of that kind? A. I will tell you just how we came to do that—that has been over three years ago when we first commenced to build with Mr. Engstrom of Hill-Engstrom Lumber Company, and that was one of his requirements, that before he would send any lumber on the jobs he wanted to see that he was ahead of the loans.

Q. That was contrary directly to Mr. Kimball's instructions in the case? A. No.

Q. Did you not so testify just now? A. I don't think I did.

Q. Did you not say that you didn't want the work done

55 until the deal had closed? Did you not say that you didn't do the work until the deal was closed? A. I said we didn't want to do any work until we had got the deed.

Q. That was the policy that you were following out in that case? A. Yes sir.

CROSS EXAMINATION by Mr. Harris.

Q. You say you don't know how cold it was on the 3d? A. I know it was cold.

Q. You know it was cold? A. Yes sir.

Q. At whose direction did you go up to that property that morning. A. Why, at my father's and my own.

Q. Had you any conversation with Mr. Underwood or Jones prior to that time? A. Yes sir.

Q. About going up there that morning? A. Yes sir.
Q. At what time did you have your conversation with them? A. I saw Underwood at the fire.
Q. You mean the Bitting fire? A. Yes sir.
Q. At what time of day? A. That was right after dinner.
Q. When did you see Mr. Jones? A. Didn't see Mr. Jones until the next morning.
Q. The next morning? What did you say to Mr. Underwood then? A. I told Mr. Underwood that we had to have that job started, that we couldn't get any money on it until it was started, and I told him to come out there. It didn't make no difference how cold it was.
Q. At that time you didn't have the deed, did you?
56 A. No sir.
Q. And at that time you didn't know that you were going to absolutely get the deed? A. Oh, yes sir, we did.
A. How did you know? A. Because Mr. Brubacher was examining the abstract at that time, and I think the deed was made out a week before this.
Q. Did you ever see the deed? A. No sir.
Q. Never did? A. After it was taken to the office——
Q. After it was recorded? A. No sir.
Q. You went to the property on the morning of the 3d at 8 o'clock? A. Yes sir.
Q. At that time you didn't have the deed? A. My father said he was going to get it.
Q. I wasn't until when he came home that night that you did have any deed? A. Not till that evening.
Q. And you went up there with Mr. Underwood. A. I met Mr. Underwood up there.
Q. Mr. Jones wasn't there, was he? A. No sir.
Q. And you didn't see him that day? A. He wasn't there that day.
Q. You didn't see him the next day? A. Yes sir.
Q. Where? A. On that job.
57 Q. Did you not say he was not there on that day? A. I said on the 4th, but on the 5th he wasn't there.
Q. Did you say you met Underwood up there. A. I was up there first.
Q. How did he come up? A. He came up Waco.
Q. How? A. With teams and wagons, a plow, and scraper.
Q. Anything else? A. And picks.
Q. And you set the stakes? A. We re-staked them. The first time I staked that out before the timber was cut down.
Q. That was before you had any deed at all? A. Yes sir.
Q. And you had staked it out? A. Yes sir.
Q. And then you re-staked it? A. Yes sir
Q. And the ground was frozen six inches deep? A. I think so.

Q. And who run those lines? A. Me and Mr. Underwood.

Q. And how did you get down into the ground there to make the stakes? A. Well, we made the stakes, and the ground was cracked, and we might hit a big crack.

Q. So the ground was cracked exactly according to some providential scheme, that is it? A. Well, we might not have driven the stake that way.

Q. Well, how? A. .....

58 Q. Oh, you did drive stakes? A. Yes.

Q. Didn't you say you staked it out before this? A. Yes sir.

Q. And you re-staked it? A. I wanted to take in the measurements; I was off a foot on the north side, and I had to move my stakes.

Q. In other words, the first time you weren't on the lines? A. No sir.

Q. Now, how many stakes did you drive down? A Four stakes.

Q. And you drove them down through the frozen ground? A. I got them——

Q. What kind of stakes? Pine Stakes? A. Yes sir.

Q. What did you use—an ax (?)? A. We didn't have any up there.

Q. What did you drive stakes with? A. I might have borrowed a hammer from Mr. Conklin.

Q. You went to the house and got their hammer? A. I might have found a hammer at the.....or I might have went over to the other buildings.

Q. Which did you do? A. I don't remember.

Q. Then you haven't any recollection at all at this time as to what kind of appliance you used to re-set those stakes? A. I don't think I used anything but the tape.

Q. Then how did you drive the stakes. A. Didn't have to drive any stakes.

Q. You just used a frozen clod that time? A. I think

59 I took a pick and just marked the corners.

Q. You think you did? A. I think so.

Q. Then what did you go for the hammer for? A. You asked me about the first time I staked it.

Q. Didn't you say at the start that you re-staked it? A. Yes.

Q. And now you say you didn't use anything but a tape line and a pick? You might have misunderstood my meaning. I am talking now about what you used to get the stakes down. A. I might have gotten down there somehow, or I might have taken my measures and just marked off the corner.

Q. How did you mark it? A. I could have taken a pick. Even if I had staked it, I could have driven a pick down.

Q. The question is, what did you do? A. I do not remember.

Q. You don't remember now what you did do up there that morning? A. I know that I took new measurements.

Q. And you say now that you re-staked it? A. I say I took new measurements.

Q. You took new measurements. Well, and new measurements on a piece of frozen ground that was frozen six inches deep, without some kind of a mark, wouldn't amount to a hill of beans, would it? A. I could get a measurement, it didn't make and difference whether the ground was frozen. I had the sidewalk in front to go by.

Q. How for away was the sidewalk from it? A. I lined it up with the other flat.

Q. Which way was that from Mr. Conklin? A. South,
60 the old flat.

Q. That is, in other words, Mr. Conklin's house stood between this new flat and the old one? Then you took the old flat and lined up the new one from it? A. Yes sir.

Q. Now then, what is that distance? A. I don't remember.

Q. Was it 200 feet? A. I don't hemember.

Q. Maybe it was a halfmile; was it? .A No, I should judge it was about 35 or 40 feet.

Q. 40 feet south of Conklin's house that he lived at? How far was it from Mr. Conklin's house? A.....

Q. This old flat was south of Conklin's? A. Yes.

Q. And this new one was north of Conklin's? A. Yes.

Q. And then, what was the distance from the old flat to the new one? A. It was, I think Mr. Conklin has 98 feet in there.

Q. And your flat was 36 by 76? A. That was the building.

Q. And then you lined up the new one by the old one? A. Well we got—what I mean by lining up, we got a distance—we put the two buildings in line in front.

Q. And you didn't have any instrument to do that with? A. Just the tape.

Q. And so you went down to the old one and drew a line of tape from the old one up past Conklin's house, up to this other one? A. We measured it.

61 That's the way, got it from the old one? A. Yes sir.

Q. So it was absolutely true, providing the old house was true? A. We didn't go by the house,—by the old flat. Mr.——house was there, and he showed us the corner, and Mr. Conklin told us how many feet in the whole block—I think he had 300 feet.

Q. And then you went up there and measured it without any instrument at all, just simply ar ordinary tape line? And you don't know now whether you drove a stake, whether you made nay mark at all, whether you did it with a pick, a hammer, or whether with your heel? A. I know we marked it, re-staked it, and got new measurements.

Q. And then I asked you if you drove new stakes or did it with a pick. A. We used a different measurement.

Q. Then the west half was laid out with a pick, and the east half with a hammer? What do you mean? A. I mean the first time that I staked out that flat it was all in grapevines.

Q. I asked you what you meant by saying you used different measurements. A. I misunderstood that—I mean this, that the first time I staked out that flat I couldn't get the measurements correct because that was all in timber and a little of everything.

Q. You went then by the other measurements? Now then, what other measurements did you use on the morning you went up with Mr. Underwood? A. I used a stell tape.

Q. And so far as you now recollect, that is the only tool or instrument you had in your hands? A. That is the
62 only thing we took to line up with.

Q. I will ask you now, did you have any other instrument except that tape line? A. I don't remember.

Q. Now then, did you see any of the family of Mr. Conklin that morning? A. The chances are I did.

Q. Are you going on chances, Mr. Bron, or do you recollect whether you saw anybody that morning? A. I think that I went in there; I generally always do.

Q. What is your distinct recollection right now as to what member of Mr. Conklin's family you saw on that morning? A. I couldn't say.

Q. You haven't got any, have you? A. No.

Q. Now, what did Mr. Underwood do that morning? A. The first thing we done was to take new measurements.

Q. I ask you what Mr. Underwood did up there. A. That is the first thing he helped me do.

Q. Now, when that was done, what did he do? A. Then he commenced picking.

Q. On the line that you laid out? A. Yes sir.

Q. How much did he pick? A. Well, I don't remember; he got one or two loads in the wagon and hauled them away.

Q. In the morning? That was on the morning of the 3d? A. The morning of the 3d.

Q. That was what hour of day? A. Ten or fifteen minutes after eight.

Q. Now, when did he leave there? A. He left there—well, I think it was before—

Q. I will ask you this question—didn't he leave there the
63 morning that he went up there the first morning, between 11 and 12 o'clock? A. They were up there before nine the first time.

Q. The first time—on the 3d—that you say you and he were up there and he had his team there, didn't you leave there between 11 and 12 o'clock? A. I don't think it was that late.

Q. He left before 11? A. That is what I think; it might have been a little after.

Q. Now then, what went with the time after you went up there and when you got your measurements and had to get your

instruments to do this—how long was it after 8 o'clock before you and Mr. Underwood got the measurements all completed to your satisfaction? A. It didn't take us more than 15 minutes to get the measurements.

Q. Fifteen minutes? Not more than fifteen minutes? A. No sir.

Q. And then Mr. Underwood with a pick picked out two wagon loads of that frozen earth and hauled it down to the river by 10 o'clock? A. I think it was one or two loads, I wouldn't be certain as to the amount of loads, but I know he hauled one load.

Q. That was before 10 o'clock? A. Well, I said 11, I didn't say 10.

Q. Before 11? A. It might have been a little later than that.

Q. Mr. Bron, I believe you stated that you didn't give Mr. Holmes much satisfaction. You knew Mr. Holmes was attorney for Mr. Conklin, didn't you? A. Why—

Q. You knew that Mr. Holmes was Mr. Conklin's attor-
64 ney, didn't you? A. I think I did, yes.

Q. You know that Mr. Conklin had sold that property to your father, didn't yau? A. Yes sir.

Q. You knew that there was a $4500 mortgage for the purchase price of that property, didn't you? A. Yes sir.

Q. And yet, when Mr. Holmes called upon you for Mr. Conklin, with a full knowledge of all these facts, you didn't see fit to give him any satisfaction? A. I think Mr. Holmes—

Q. Answer my question. A. I don't remember whether he brought up that subject to me or not.

Q. Didn't you say you didn't give him any satisfaction? A. I know I didn't; he was talking to my father.

Q. Didn't you and he have some conversation? A. Not very much.

Q. But you didn't give him any satisfaction on what questions he asked you? A. No sir.

Q. Can you explain now why you didn't? A. Well, in the first place, he came up in the office to see about a $1000 note that was up in the Stock Yards State Bank, and he asked me several questions about that note, and I answered, and then he started talking to my father on this priority, but I don't think that I have said anything one way or another. I just listened to it.

By the Court: Answer the question.

A. I didn't think it was up to me to answer that when
65 my father was right there; he could have answered it.

Q. But you had charge of the business? A. Yes sir.

Q. You issued the checks? .A. Yes.

Q. You kept the books of the transactions of Charles Bron's affairs? A. All the books there was to keep.

Q. Thery were a good many? A. We didn't keep very many.

Q. How many jobs did you have on hand at that time?

By Mr. Brubacher: We object as improper cross-examination.

By the court: It will be overruled; you will have to make it relevant.

Q. How many jobs did you have on hand on the morning of the 3d day of January, 1911? A. Probably five or six.
Q. Were there any men at work on these other jobs on the morning of the 3d? A. Yes sir.
Q. Where? They were working on Emporia Avenue.
Q. Whereabouts is that? A. Fourth block.
Q. That building was partially up, was it? A. Yes sir.
Q. That was carpenter work, was it? A. Yes sir.
Q. What else? A. Then we were working out on the hill.
Q. What were you working out there? A. I think we were working on Mr. Marsh's house.
Q. What was the state or condition on that date of the
66 Holyoke Avenue lots? A. What do you mean?
Q. What was the condition of the improvements? A. There was three houses up there—two houses up there at that time.
Q. On lots 18, 22 and— A. There was one two story house up on the corner, and then Mr. Marsh's (?) house.
Q. Then there was a house that was being built? A. That wasn't started.
Q. None of them been started at all?

By Mr. Brubacher: We object to that as getting into some other transaction that we are not—

By the court: I can't quite see what it would be material as to the work going on out there.

Q. Was any work going on out there? A. I think not.
Q. Was it too cold to work on the hill? A. We didn't have any job out there. This was the first job that Mr. Underwood and Jones excavated for us.
Q. Now you stated a while ago, I believe, that it was the policy of Charles Bron & Son, or Charles Bron, to borrow money on properties and after the mortgages were made, or before the mortgages were made, to see that the improvements were started before the mortgages were executed? A. That was my policy.
Q. And your father, of course, and you, were together, were you not? A. I was working for my father.
Q. That was the policy of the firm? A. I don't know whether I mentioned it to him.
Q. That was a secret matter within your breast all this
67 time, was it? A. He might have known of it.

Q. But that was your policy? A. Yes sir.

Q. In other words, your policy was to give a mortgage, borrow the money, and start a building, so as to beat the mortgagee out of his money? A. No sir, I saw the way the things were going, and my father didn't.

Q. Had it been your policy for three years? A. A little over three years now.

Q. A little over three years? A. Since Mr. Engstrom told us.

Q. And for a period of three years that had been your policy? A. Yes sir.

RE-DIRECT EXAMINATION, by Mr. Brubacher.

Q. What do you mean, Charley, by saying that you saw the way things were going? A. I saw it especially on the Waco Avenue flat and the 12th Street. My father was started in there, he gave Mr. Conklin $4500 for the Waco Avenue lot, and $6000 for the 12th Street, that made $10000; then he owed Mr. Kimball $8000 that the agreement was that he should take out these two loans, that made $18000, and then for building there, that cost nearly $30000, that made a total of nearly $50000; I couldn't see how we were making out on that.

Q. And you couldn't see how these material men were going to pay their claims if Mr. Kimball wouldn't permit you to use the money to go in there? A. Yes sir.

Q. Now, what was Mr. Kimball's policy with reference to advancing money before or after the job was started?
68 A. He never would advance any money until the job was started.

Q. Did you make numerous mortgage loans with him to put up improvements? A. Yes sir.

Q. In all of them, or in any of them, did he advance any money before the work was begun? A. The only job I remember of was his own, that was on 730 Market, he advanced $200 to start that building; that was a couple of months before we have started, but I don't think there was but one job, and he wouldn't advance the money unless it was started.

Q. Now, what was the reason that you went up there on January 3d and started this work that very cold morning? A. Because we needed the money.

Q. Why didn't you get the money? A. Because he wouldn't pay it. He wouldn't pay any until the job was started.

Q. That was the reason that your father told you to go up—

Objection.

Sustained.

Q. You stated that your father directed you to go up and get the money—I mean to start the job? A. Yes sir.

Q. You know he got $350 that day? A. Yes sir.

Q. When did you find that out? A. That evening when I came home.

Q. Did you ever start any other job on property belonging to Mr. Conklin before you got the deed?

By the court: Objection sustained.

Q. I believe you said you saw Mr. Underwood at the fire
69 A. Yes sir.

Q. What fire was that? A. The Bitting.

Q. When was that? A. That was on January 2d, New Year's day.

Q. Did you tell Underwood at that time to be at the premises the next morning? A. Yes sir.

Q. Had you and your father any understanding that the work was to be begun the next morning? A. I told my father that I had saw Underwood, and he was going to be there in the morning.

Q. When you first staked the property out, you say there was underbrush, grape vines, and other shrubbery on the ground? A. Yes sir.

Q. By reason of that fact you didn't get the exact lines? A. Yes sir.

Q. When did you make that staking out originally? A. That was immediately after Christmas.

Q. Thereafter the ground was cleared? A. It was cleared between the holidays.

Q. So when you went up on January 3d, you discovered that the stakes were not correct? A. The stakes were wrong, yes sir.

Q. And you and Mr. Underwood reset the lines at that time? Now Mr. Holmes brought out something about a sewer. What part of the premises did that sewer run through? A. That sewer was on the west end of the cellar.

Q. Was it in the excavating part or in the wall? A. That was in the wall part.

Q. Now whereabouts or how far had the cellar progressed when that was struck? A. That cellar was practically done, and they had commenced to take out their runways when they hit this sewer.

Q. What do you mean by the runways? A. That was the way to get down into the cellar.

Q. Where the teams came up? A. That was our stairway into the cellar. We marked them out, but I didn't explain it to you. That is just a place there about six foot wide and about 16 long. It starts from the back porch and then goes into the cellar on each side.

Q. And it was while you were cleaning out that part, was it? A. It was when they started. I could mark that out in a minute.

By Mr. Brubacher: It might not be very clear in the record.

(Witness makes diagram.)

Q. Now put the points of the compass on the diagram that you have drawn. A. I will mark that sewer. It is excavated, this part here. That should be 38 by 6.

Q. 38 north and south? A. 38 north and south; 36 east and west.

Q. Now what is that part marked along there? A. That is unexcavated.

Q. What was that left for unexcavated? A. That was left for chimneys, there was one big chimney went up in here, and we wanted to get the smaller as near the center of the house as we could on account of the heat. That was one
71 reason we put in these runways.

Q. What do you call a runway? A. A stairway.

Q. That part marked B—B? A. Yes sir.

Q. Is that what you call a runway? A. Yes sir

Q. While you were excavating these runways, was that where the sewer was struck? A. Yes sir.

Q. The rest of the cellar had been excavated. A. Yes sir.

By Mr. Brubacher: We offer in evidence the diagram marked Exhibit E.

Objection.

Overruled.

Q. Mr. Holmes questioned you something in reference to a water pipe breaking? A. There was an old water pipe that we hit in the cellar, and hadn't been in use; that was all rusted out, but I don't think that was what he had reference to. After we had started the concrete, we had the front pipe to bust.

Q. What do you mean by starting the concrete? A. It was the concrete work for the foundation. We had the water service brought in from the street to the front of the house.

Q. When did you strike that in reference to the time you began work? A. We struck an old water pipe I should think, the second or third day we worked on the cellar.

Q. And did that spring a leak? A. No, there was no
72 water in it.

Q. When did you strike that water pipe that some water escaped into the basement? A. I think Mr. Holmes has reference to the water that we took in for building purposes—that is, we brought a line to the street into the front of the flat so that we could mix our concrete.

Q. When did you do that? A. That is about the 20th.

Q. That was after the cellar was completed? A. Yes sir.

Q. The sewer was struck on the 10th? A. The 10th.

Q. How many cubic yards of the dirt was taken out of that cellar? A. Very near 300.

Q. How many cubic yards a day would you take out under ordinary circumstance?

By Mr. Harris: We object as irrelevant.

By the court: Sustained.

RE-CROSS EXAMINATION, by Mr. Holmes.

Q. Mr. Bron, you heard Mr. Hoff testify, didn't you? A. Yes sir.

Q. You heard him testify that he did that sewer work on the 12th day of January, did you? A. On the 11th.

Q. Do you know whether it was the 12th? A. 11th.

Q. That is your memory? And if he said actually it was done on the 12th, you are mistaken? A. I saw his books on that.

Q. You are going by his books, are you? A. His time
73 slip.

Q. That is what you went by in refreshing your memory on this whole deal? A. Oh, no.

Q. What do you go by? A. I will tell you the reason I went to him on that. You remember when we had court here you came up and asked me about that sewer.

Q. I asked you? A. You wanted to know what that sewer was, and when we hit that, and you asked if I remembered when the cellar was flooded, that was the reason I asked Mr. Hoff to get the exact date.

Q. You went to him and refreshed your memory, and outside the refreshing of your memory you wouldn't remember at all? A. I think so.

Q. Why? A. Well, I was up there every day, I don't think there was a day I wasn't no the job, and I can figure up. I remember I paid Underwood on the 7th; Sunday was the 8th; Monday the 9th; it would be Tuesday night they hit the sewer.

Q. As a matter of fact you don't recall paying him except by that check? A. I remember I paid him.

Q. But the date you don't recall except by the check? A. I could tell if I saw the check.

Q. Then Mr. Hoff's memorandum and this check's memorandum, is that by what you fix the date you commenced work? A. No sir. I have that Bitting fire, that's the reason I know that work was started on the 3d.

Q. Your memory is that it was moderately cold?
74 A. Yes sir.

Q. And you wore your overcoat and gloves when you worked, did you? A. I didn't work only while I was staking it out.

Q. How long was that? A. About 15 minutes.

Q. When did you go back again? A. I stayed until Mr. Underwood went.

Q. You didn't work at all? A. No sir.

Q. You simply stood about? A. Yes sir.

Q. Did you keep your gloves on? A. I kept my overcoat on; I never wear gloves.

Q. You stayed there the whole three hours? A. If I wasn't there, I was in the other flat. We were just finishing that up.

Q. You don't know that you were up there all that time? A. Yes sir, I know I was.

Q. You just said you were either there or the other flat? A. It was not over a hundred feet away.

Q. That's the one by which you set the foundation? A. We took the line from that flat. We wanted to set both flats an equal distance from the street.

By the court: I will take judicial notice of the fact that there was a big fire on the 2d and it was all covered with ice.

RE-DIRECT EXAMINATION.

Q. And that was the reason Underwood quit, it was so cold? A. Yes sir.

75 DIRECT EXAMINATION, OF E. L. MARLOW, by Mr. Brubacher.

Q. State your name to the court. A. E. L. Marlow.

Q. What business are you in? A. Coal and feed.

Q. Do you know J. A. Jones? A. Yes.

Q. Has he ever worked for you? A. Yes sir.

Q. Did he work for you the fore part of last year? A. Yes sir.

Q. What day?

By Mr. Holmes: We object as immaterial, what day Jones worked.

By the Court: Sustained.

Q. Did you see him on the morning of the 4th?

Objection.

Overruled.

A. Yes sir.

Q. Where did you see him? A. In front of my office.

Q. Did you have a conversation with him at that time? A. I did.

Q. What did he have with him? A. He had a team, a wagon, a plow, and a scraper, in the wagon.

Q. Did he tell you what he was going to do?

By Mr. Holmes: We object, irrelevant, incompetent and immaterial, and hearsay.

By the Court: Sustained.

By Mr. Brubacher: We offer to prove now by this witness, as a part of the transaction, part of the res gestae, that J. A. Jones told the witness that he was going to excavate the

76 Bron cellar at about 8:15 o'clock January 4th, and the said J. A. Jones is one and the same party that had the contract for the excavation.

By the Court: Offer declined.

By Mr. Brubacher: To which we except.

Q. Did you pay him any money that morning?

By Mr. Holmes: We object as immaterial, incompetent and irrelevant.

By the Court: Sustained.

By Mr. Brubacher: The mechanics lien claimants offer to show by this witness that he paid J. A. Jones $5.25 at about 8:15 o'clock in the morning January 4th, and made a charge at that time upon the books of the money so paid, and make this offer in connection with the previous offer.

By the Court: Declined.

CROSS EXAMINATION, by Mr. Holmes.

Q. Did you talk with anybody at that date?

By Mr. Brubacher: We object as incompetent.

By the Court: Sustained.

DIRECT EXAMINATION OF CHARLES BRON, JR., by Mr. Brubacher.

Q. You may state your name to the court, Mr. Bron. A. Charles Bron.

Q. You are the bankrupt, are you, Mr. Bron? A. Yes sir.

Q. You are the Charles Bron that got a deed from P. J. Conklin and Laura Conklin his wife to the property in controversy, 48 feet by 200 feet on North Waco? A. Yes sir.

Q. When did you get that deed, Mr. Bron? A. I got it
77 the 3d of January.

Q. What year? A. 1912.

Q. 3d of January, 1911? A. Yes sir.

Q. From whom did you get the deed? A. From Conklin.

Q. P. J. Conklin? A. Yes sir.

Q. Where was he when he gave it to you? A. In his office.

Q. And where was that, Mr. Bron. A. On Main Street.

Q. South Main? A. Yes sir.

Q. In this city? A. Yes sir.

Q. Had you had some negotiations with him prior to that time relative to buying this property? A. Yes.

Q. About how long? A. Well, I cannot say the exact time, but it was a month before.

Q. Did he furnish you with an abstract to the title to that property? A. Yes sir.

Q. What did you do with the abstract when he furnished it to you? A. I brought it up to you.

Q. Did I examine it? A. Yes sir.

Q. Did I give you a certificate, Mr. Bron with reference
78 to the title? A. Yes sir.

Q. I hand you paper marked Exhibit F, and ask you to state what it is.

By Mr. Harris: We object, your Honor, that it shows on its fact what it is.

Q. Is that the certificate in question. A. Yes.

Q. When was it given, Mr. Bron?

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial.

By the Court: Let him state that fact.

A. The 31st of December.

Q. When the certificate with reference to the title was given, to you by your attorney, what did you then do? A. Well I told it to Mr. Conklin that there was something to be fixed, and he told me he would have that fixed in a few days.

Q. What was done with reference to drawing up the papers at that time? A. Drew up the deed and the mortgage.

Q. Just state what was done with reference to drawing up the deed from Conklin to you and the mortgage from you to Conklin. A. He had these papers made out and he and his wife went down and signed it.

Q. Now, what did you do with the papers, Mr. Bron?A. I gave them to you and you looked them over to see if they were right, and I took them again and brought them up to Kimball.

Q. Did you bring them to my office first? A. Yes sir.
79 Did you inspect the deed?

Objection, immaterial.

Sustained.

Q. What did you do with the deed? A. I took it over to Kimball.

Q. That was on the 31st? A. Yes sir.

Q. That is 1910. A. Yes.

Q. Did you sign up any papers at that time either in Mr. Kimball's office, or in Conklin's office? A. No.

Q. When did you first sign up the papers?

By Mr. Holmes: And that the instrument speaks for itself.

Q. When did you sign up the papers, by that I mean the note and mortgage back to Conklin of $4500, and the $7500 to

Kimball, and the $700 mortgage to Rowe? A. Well, I signed up the papers to Kimball on the 4th in the morning.

Q. That was the morning of the day after you took the deed to him? A. Yes, the day after I brought the deed.

Q. Now, when did you sign up the deed to Conklin—I mean the mortgage to Conklin? A. I was down the same day as I signed it up to Kimball.

Q. And you and your wife came down together. A. Yes sir.

Q. And you signed the Kimball mortgage and the Conklin mortgage at the same time? A. Yes sir.

Q. Same day? A. Yes sir.

80 Q. Did you get any money from Mr. Kimball on January 3d? A. Yes.

Q. How much did you get? A. $750.

Q. Did you make any statement to Kimball on that date as to whether the work had begun on the excavation? A. I think I had been to him for money a few days before, I needed it bad, I went there New Year's and I told him I would like to have money, and he said, you bring the deed over here, and I will let you have some money.

Q. And he gave you the $750 when you brought the deed over? A. Yes, the same day; yes, the 3d, when I brought the deed over.

Q. Had you done any work there clearing off the ground or excavating the ground and cutting out the roots of the trees during the holidays? A. There was some work done there between the holidays.

Q. Of that character. A. Yes.

Q. Did you send or tell your boy Charley to go up there and begin that work on the 3d?

By Mr. Holmes: We object as incompetent, irrelevant, immaterial, and not proper to prove a thing of that kind.

By the Court: I think he may ask the principal what directions he gave; that's equivalent to asking why he didn't go himself. You may answer it.

A. I told him to go up and get it started.

Q. Now, why did you want to get it started on the 3d?

81 By Mr. Holmes: We object as improper cross examination of his own witness. Asking the reason why he did a thing.

By the Court: I do not believe it is competent.

Q. Had you any conversation with Mr. Kimball prior to that time with reference to getting the money before the work was done?

By the Court: He has stated he did a while ago.

(Question read.)

Q. Now, what was it? A. I told him I needed some money and he said I couldn't expect the money before I got the job started.

Q. Now, Mr. Bron, I will ask you whether that was the policy with Mr. Kimball with reference to all the loans covering property you were going to make improvements on?

By the Court: Sustained.

Q. Do you recall, Mr. Bron, what conversation you and Kimball had when you took the deed over to him on the 3d? A. Well, he had to make out the papers to sign up the next morning.

CROSS EXAMINATION, by Mr. Holmes.

Q. Mr. Bron, it has been offered in evidence in this case that the mortgage was dated the 3d day of December, 1910. Do you know that to be a fact? A. What do you mean?

Q. The mortgage to Mr. Conklin? That's a fact, was it? A. What do you mean?

Q. That the mortgage you made to Mr. Conklin is dated December 31, 1910? Do you recall that to be a fact?

Objection.

82 A. That was the date of it.

Q. When did you first see that mortgage? A. I think me and my wife signed it up at the same time I signed to Kimball.

Q. Wasn't it the understanding between you and Mr. Conk- that the mortgage was to be made out at the same time the deed was? A. Well, I cannot say about that. I do not think so.

Q. You think so? A. I am not sure; I do not think so.

Q. You gave the mortgage back for the purchase money at the time you gave the deed? A. I gave him a mortgage back for the lots at the time he gave the deed.

Q. That was the understanding? A. That was the understanding that I should give him a mortgage back for the purchase money.

Q. At the time you gave him the deed? A. No, he didn't say anything about the time.

Q. How much of a mortgage did he say you would agree to be ahead of it? A. $7500.

Q. That was the amount he was to have ahead of his mortgage? A. Yes.

Q. You was to give him a mortgage for the purchase money when he gave you a deed, subject to the $7500? A. Yes.

Q. That was the contract? A. Yes sir.

Q. Mr. Bron, do you recall the time when I was up there with you in your office? A. Yes.

83 Q. Did you not say at that time that the Waco Avenue as far as Mr. Conklin was concerned was all right, that he was ahead there?

By Mr. Brubacher: We object as improper cross examination, calling for conclusion of the witness.

By the Court: Objection overruled.

By Mr. Brown: We object as incompetent, irrelevant, immaterial, and improper cross examination.

By the Court: Overruled.

By Mr. Ayers: It is also leading.

By the Court: The objection will be sustained.

Q. I will ask you the question definitely, did you not say at that time in your office that the mortgage was given before the building was started?

By Mr. Brubacher: We object—

A. No, Mr. Conklin told me that he didn't want any of the stuff before the mortgage was filed for record; there was—

By Mr. Brubacher: We move to strike that out as not responsive to the question.

By the Court: Overruled.

Q. Did you not say that Mr. Conklin said that he didn't want anything done there until the deal between you and him was closed or words to that effect? A. No. He say I could go ahead and clean up the.....up there before mortgage was given.

Q. As a matter of fact, wasn't there a lot of stuff up there before that was changed from the other flat? A. No.

Q. There wasn't ay stuff used in this flat that was intend-
84 ed for the other flat? A No.

Q. Not at all? A. Not that I know of.

Q. When were you up there with respect to the delivery of this deed? Before the delivery of the deed? A. You mean up to Conklin's? I was there on the 3d.

Q. What were you doing there? A. I went to get the deed.

Q. I am talking about this property. A. No, I wasn't there on the 3d.

Q. Were you on the 4th? A. No.

Q. 5th? A. I cannot answer that.

Q. 6th. A. My son took care of it.

Q. Were you there on the 6th? A. I cannot say for sure.

Q. Were you there on the 7th? A. I cannot say sure.

Q. Were you there on the 9th? A. I was there when they dug up the sewer.

Q. On the 12th? A. I was there when they dug up the sewer.

Q. Was it not the contract between you and Mr. Conklin that nothing was to be done there until he had his mortgage?

By Mr. Brubacher: He has already answered that.

By the Court: I think he has made a complete answer to that question, Mr. Holmes.

CROSS EXAMINATION, by Mr. Harris.

Q. Mr. Bron, did Mr. Conklin give you that deed at his office or at Mr. Kimball's? A. In his office.

Q. On what date? A. The 3d.

85 Q. The 3d? A. Yes sir.

Q. Where was his mortgage? A. What mortgage?

A. Mr. Conklin's mortgage. A. He had it in his office?

Q. And he gave you that deed— A. Yes, and told me to come down—

Q. Just wait until I get through—And he gave you that deed to take out of his office without ever having it placed on record, and kept his mortgage without it being on record? A. That's what he done. I got the deed.

Q. You got the deed, and Conklin had a mortgage, and neither one of them was on record? Is that correct. A. Yes sir.

Q. And that was on the day of the 3d? A. Yes sir.

Q. And what hour of the day? A. I canot say sure. I cannot remember just the time.

Q. When did you go to Mr. Kimball's office the next day? A. In the morning.

Q. What time? A. He told us to be down there about 10 o'clock.

Q. And then you signed up what? A. I signed up the mortgages, $7500.

Q. And also a $700 one? A. Yes, there was two mortgages.

Q. And then you gave the deed to Mr. Kimball? A. I gave him the deed the day before.

86 Q. You gave him the deed the night before did you? A. Yes sir.

Q. At what time? A. I think it was in the afternoon; I am not sure; I think it was in the afternoon, though.

Q. Now then, when you were up there at the office the next morning you had the deed and the two mortgages, and the Conklin mortgage, they were all there together? A. I didn't have the papers.

Q. You saw all these papers there together? A. I signed up the mortgages.

Q. But all these papers were sent up for record together, weren't they? A. I supposed it would be done. I never done it.

Q. That was done in the morning too wasn't it? A. Well—

Q. You say Mr. Conklin said to you that you musn't do any work up there until after he got the mortgage?

By Mr. Brubacher: We object as putting something in his mouth which he didn't say; improper cross-examination.

By the court: I think that is calling for conclusion.

Q. Did you and Mr. Conklin have any conversation about the fact that you were not to do any work up there until he got his mortgage? A. Yes we had. He called me—

By the court: Wait a minute.

Q. Mr. Conklin said to you in that conversation, did he not, that you were not to do any work on these premises until after you had executed the mortgage to him? A. No, he didn't say that.

87 Q. Didn't say that? A. No sir

Q. What did he say? A. He told us he didn't want, for us not to get any lumber there, or stone there, or cement there, or brick there before the loan was filed for record.

Q. Now why did he say that? Did he say?

By Mr. Brubacher: We object to why he said it, unless he knows.

Q. He said he didn't want any material on the ground until after his mortgage was recorded? A. Yes sir.

Q. Didn't want any stone there? A. Yes sir.

Q. Didn't want any lumber around there. A. Yes sir.

Q. Didn't want any work done? A. Didn't say that.

Q. He said lumber, building material, and stone, and everything of that kind, but didn't say anything about work? A. Didn't say anything about excavating and taking those trees away.

Q. Did you see those trees taken away? A. I saw the trees wasn't there.

Q. When were you up there? A. I wasn't there—

Q. You wasn't there on the 3d? A. No sir.

Q. Wasn't there on the 3d? A. I saw they were away.

Q. When were you there that you know after the 9th? You wasn't up there until the 9th?

By Mr. Brubacher: He hasn't testified that he wasn't up
88 there until the 9th.

Q. Were you there on the 1st of January? A. I couldn't say.

Q. Were you there on the 2d? A. I don't think I was.

Q. December 31st? A. I couldn't say sure whether I was or not. I cannot remember just them days what I done and what it was.

Q. Well, you weren't up there between the 20th of December and the 9th day of January, were you? A. I believe I was.

Q. What day? A. I cannot tell you exactly.

Q. It wasn't between the 20th and the 9th? A. I cannot say sure, maybe I was there.

Q. You don't have any distinct recollection, do you? A. I cannot say what day.

Q. You don't know anything about when those trees were taken out do you? Except that when you went up there the 9th you say they were out? A. I remember this, that they were taken away between Christmas and New Years.

Q. And you weren't up there between those days? A. I must be there.

Q. Who did the work? A. Them excavators.

Q. Who were they? A. Jones and Underwood.

Q. Do you think they did that on Christmas day? A. I do not think so.

Q. On the 26th? A. Some day between Christmas and New Years.

Q. Some day between December 25th and January 1st 89 they did it? A. Yes sir.

Q. That is your best judgment and recollection? A. Yes sir.

Q. You weren't up there to see it done, were you? A. What?

Q. You weren't up there? A. I think I was up there between the holidays.

Q. But you aren't positive? A. I believe I was.

Q. You just kind of think so? A. No, I believe I was there.

Q. When did they take those trees out? A. There was . . . . . sometime, I said, during the week.

Q. Did they dig them or saw them? A. I think they were dug.

Q. But you didn't see any saw up there? A. I couldn't say.

Q. You aren't positive? A. No sir.

RE-DIRECT EXAMINATION.

Q. You think they dug them up during the holidays, Mr. Bron? A. Yes sir.

Q. And did they do any other work there during the holidays? A. No, I think during the holidays.

Q. Cleaned off the ground? A. Yes sir.

Q. Now, Mr. Harris asked you whether or not on the 3d of January you saw the Conklin mortgage in Mr. Kimball's offce. A. On the 3d; yes.

Q. Did you see Mr. Conklin's deed (?) in Mr. Kimball's office on the 3d of January? A. . . . . .

Q. You saw his deed there on the 3d? A. I saw the
90 deed there. On the 3d.

Q. When did you sign up the mortgage? A. I think the same day. I told him to bring it over to Kimball.

Q. The same day as what? A. 4th, in the morning.

Q. Did you ever have a deed from Mr. Conklin on any other property for which you were to give back a mortgage for the purchase price, before you executed any mortgage to him?

Objection.

Sustained.

November 20, 1912.

Re-direct examintion, continued.

By Mr. Gardner:

Q. Mr. Bron, I believe you stated yesterday in answer to a question of Mr. Harris, you stated that you were up at the Waco Street job, 905, when the sewer burst. Will you please tell the court in what condition the cellar was at that time relative to the progress of the work?

By the court: It is irrelevant.

Q. How much work had been done when they hit the sewer? A. They were most down and they had to quit till they got the sewer fixed.

Q. You are a contractor, or were before you were adjudged a bankrupt, Mr. Bron? A. Yes sir.

Q. You are familiar with the digging of the cellars? A. Yes.

Q. In your opinion, Mr. Bron, at the time you were up there when the sewer burst, how many cubic yards of dirt had been removed from the excavation? A. Well, I cannot tell, my son had more account of that; I think there was close
91 to 300 yard moved.

Q. Now, Mr. Bron, in your opinion, with the number of workmen that were up there, how many days would it take to remove this 300 yards?

Objection.

Sustained.

RE-CROSS EXAMINATION, by Mr. Holmes.

Q. Mr. Bron, have you talked with Mr. Conklin with respect to the time of the commencement of this building? A. You mean—

Q. Within the last month. A. Yes, I was in his office.

Q. Did you not tell him that he was all right on this Waco property, but not on the Market?

By Mr. Gardner: To which we object as incompetent, irrelevant and immaterial.

By the court: Overruled.

By Mr. Gardner: No proper foundation having been laid to the question.

By the court: You may answer.

By Mr. Brown: Not proper cross examination. We further object to it, your Honor, for the reason that the same is indefinite.

By the court: You may answer.

A. Well, I went in his office and you went (?); we had an understanding that this hadn't been any stuff there. I didn't know much about this. . . . . He told me he didn't want any stuff on the job before the mortgage was recorded.

Q. Had you not at that time been informed that it was the material for the commencement of the building—

92 By Mr. Gardner: We object as incompetent, irrelevant, and immaterial, hearsay.

By the court: Objection sustained.

Q. Wasn't the conversation with him directed to the commencement of the building?

By Mr. Gardner: We object as incompetent, irrelevant, and immaterial, no proper foundation having been made, and for the further reason that the question is indefinite.

By the court: Overruled.

A. No.

Q. You had never spoke to him anything about the commencement of the building at all?

By Mr. Gardner: To which we object as being incompetent, irrelevant, and immaterial, a matter of hearsay, not proper cross examination.

By the court: Sustained.

Q. What was the conversation between you and Mr. Conklin? A. He asked me did I think that he was ahead, and I didn't know much about the law, but I told him I guess so, that I didn't know the law.

Q. That was all that was said? A. Yes sir.

DIRECT EXAMINATION OF C. L. UNDERWOOD, by Mr. Brubacher.

Q. State your name to the court, Mr. Underwood. A. C. L. Underwood. Is the way I sign.

Q. What is your business? A. Farming now.
Q. Where do you live? A. Live six miles east of Lawrence on 21st.
Q. Did you formerly live in Wichita? A. Yes sir.
93 Q. And did business with Mr. Bron? A. Yes sir.
Q. Are you Charles Underwood that had a contract with him together with Mr. Jones, to excavate on the cellar on what is known as the Waco Street flats, in this city? A. Yes sir.
Q. About when did you make that contract with him? A. Well, it was before the holidays, but I do not remember the date.
Q. When did you begin work under that contract? A. The morning of the 3d.
Q. When was your first work done there, Mr. Underwood, with reference to cleaning off the premises?

By Mr. Harris: To which we object because he hasn't testified anything about that.

Q. What do you mean by—what work did you do on the 3d? A. Excavating.
Q. What did you do towards excavating on the morning of the 3d? A. Why I just went up there, and it was so cold I couldn't stand it, and I think I hauled out two loads, and went home.
Q. That was the 3d of January, 1911? A. Yes sir.
Q. Who did you meet up there, Mr. Underwood? A. Charley Bron, the young man.
Q. Have you made the arrangements prior to that time to meet him up there? A. Yes sir, the day before.
Q. Where did you see him the day before? A. At the Bitting fire.
Q. What was the conversion you had at the Bitting
94 fire, if you remember? A. He told me we had to commence work—had to commence the next morning.

By Mr. Harris: I move to strike out that answer, not binding on the adverse claimants.

By the court: Objection sustained, because it does not state the conversation had.

Q. State the conversation as near as you can, Mr. Underwood.—Let me ask you again, state the exact words that were used between you and Mr. Bron at the fire with reference to beginning work the next morning at this excavation. Can you use the exact words? A. Well, I can make the meaning of the conversation.
Q. Can you give the substance? A. Yes sir.
Q. Give the substance then? A. He said we had to commence work the next morning on the Waco flat, and said he would be there before I got there. I didn't get there, it

might have been a few minutes after, but he was there on the work then ready to start.

Q. What did you take with you? A. I took my shovels, picks, and scraper.

Q. Wagon and team? A. Wagon and team.

Q. How long did you work there that morning, Mr. Underwood? A. Well, along about 10 o'clock, I judge, maybe a little after I paid no attention to the exact time, on account of it being so cold.

Q. It was a very cold morning? A. It was a very cold morning.

Q. When nest did you work on the job? A. The next morning Jones met me there.

Q. That is your partner? A. Yes sir.

95 Q. You were both working then? A. Both worked that day.

Q. How long did you work? A. Why we worked all day.

Q. Who was there on the 5th of January? A. Jones' boy and me and a hired man.

Q. And did you work on the 6th? A. Yes sir.

Q. Do you know what day of the month the 7th was? A. Saturday.

Q. Did you get any money from Mr. Bron on Saturday on that job. A. Yes sir.

Q. You remember getting a check from Mr. Bron? A. Yes sir.

Q. I show you check numbered 170, marked Exhibit C—for what did you get this check No. 170, marked Exhibit C? A. To pay our hired help.

Q. For what work? A. For working up there—for shoveling dirt there in the cellar.

Q. At what place? A. Waco Avenue.

Q. The property that has been testified to here? A. Yes sir.

Q. You had no other work up there at that time for Mr. Bron? A. No sir.

Q. Do you remember the circumstance of a sewer being struck and broken there? A. Yes sir.

Q. When was that about? A. Well, not until along some time in that week, that Friday, I think, Thursday or Friday; I do not know the exact date. No, I couldn't say.

96 Q. In what condition was the cellar at the time you struck the sewer or how far had it progressed? A. Well, we had run down probably 16 or 18 inches in the runways and going down the far side of the cellar and leaving the slant to get our teams out was when we struck it. We was down further on the east side than any place else, I mean leaving those runways to get out and plowing them down so the teams could get out was where we found the sewer.

Q. Had you done any work on that property during the holidays? A. I cut down some trees—went up there and cut down some trees and brush.

Q. Was that a part of your contract to excavate the cellar?

Objection.

Sustained.

Q. State what your contract was relative to excavating the cellar. What did it include? A. We was to get 35c a yard and take it back to the river.

Q. 35c a yard for— A. For the excavation and took it all back to the river and filled up.

Q. Were there any trees there? A. Two.

Q. In the part of the premises where you had to do the excavation A. Yes sir.

Q. Was it a part of your contract to dig out those trees?

By Harris: We object; any part of the contract.

By the Court: Sustained.

Q. Did you remove those trees? A. Yes sir.

Q. Did you get any extra pay for the removing?

97 A. No sir.

Q. Was that in the contract?

Objection.

Sustained.

Exception.

Q. I will ask you again, Mr. Underwood, what this 35c a yard included with reference to clearing the property, that is, taking down the trees.

By Mr. Harris: I object for the reason that is asking for conclusion in place of asking for a contract.

By the Court: Sustained.

Q. What was the condition of the property, Mr. Underwood, at the time you made the contract with Bron to do the excavating for 35c a yard?

Objection.

Overruled.

A. Why, it had blackberries, raspberries, and a few trees, I don't remember what kind of trees, the fruit trees on, probably six, I think, included the number.

Q. Were there any shade trees? A. Not that we had anything to do with.

Q. What do you mean by what you had anything to do with?

By Mr. Harris: We object.

By the Court: He may answer that.

A. Well, there was some large trees that other parties took off for the wood, and we didn't want to do that, that stood in the front of the flat.

Q. How's that? A. 3 (?) large trees, I would say it was immaterial to me to bother with other people's business, and they took those threes down for the wood. I didn't want the trees, and didn't have any use for it.

98 Q. That was during the holidays? A. Don't remember the date of those other fellows. We went up there and cleaned this other stuff off and took it back during the holidays. Don't remember about this other.

Q. Did you see any member of the Conklin family at that time? A. I don't remember.

Q. To remind you, did you see Mrs. Conklin and have a talk with her relative to the fence?

By Mr. Harris: We object—it is indefinite.

By the Court: Sustained.

Q. During the holidays when you cleared off the property? A. Yes sir.

Q. Did you have any conversation with her? A. She told me to take the fence down, and I could have the poles and wire; it was a little old checken lot, and we took it down and hauled it home.

Q. That was during the holidays? A. It was during the holidays.

By Mr. Harris: I move to strike out that answer as immaterial, having no bearing on the controversy.

By the Court: It is a serious question in my mind whether or not any of it has any bearing on it. I shall let it stand.

Q. Did you have your team up with you during the holidays at these premises? A. Yes sir.

Q. What did you do with the team? A. Grubbed some treets out.

Q. Did you use your wagon for any purpose? A. Not only to haul the old posts off.

CROSS EXAMINATION by Mr. Harris.

99 Q. Mr. Underwood, the first conversation that you had with Charles Bron was at the Bitting building on the day of the fire? A. Well, not the first—that was the date he told us we had to go to work.

Q. All right; when was the contract made between you and Bron? A. Well, we had the promise of it for a month, I guess; I don't remember.

Q. You don't remember? About a month? A. I expect; I don't remember exactly.

Q. What was said? A. Well, that was my business, and I was—

Q. I know that was your business, but what was said? What do you mean, had the promise. A. He promised me some work on that flat as soon as it was started. He said he was going to build the one on Waco, and I could have the job with Jones; I was talking with him myself.

Q. What was the job you had? A. Excavating the cellar.

Q. Excavating the cellar? A. Yes sir.

Q. You say for how much a yard? A. Well, on the start the figures it 25c, but then he changed the plans and I raised the price. We was just to take it out and throw it to the rear, and after he had made up his mind it had to go clear to the river we had to have more money for it.

Q. When did you make your first contract? A. I judge a month before we talked the price over.

Q. A month before? A. I guess it would be some-
100 wheres along there.

Q. Where was that? A. I couldn't say.

Q. Can't remember A. I lived on Grove and he lived on Popular, and we met quite often up along the street there.

Q. He simply suggested to you he would build a flat up there on Waco and give you the job? A. Yes sir.

Q. When he got to it? A. Yes sir.

Q. And give you 25c? A. Yes sir.

Q. Now then, subsequently you had occasion to raise the price? That was after you commenced to excavate? A. No sir.

Q. When was it? A. That was after we went up to see the situation of the ground and when he wanted the work done.

Q. When was that? A. During the holidays.

Q. The contract between you and him was that you were to excavate the cellar in the start for 25c a yard? A. That was the first talk.

Q. And subsequently on account of some change in the plans and difference of haul it was made 35c a yard? A. Yes sir.

Q. Was that all the contract that was had between you and Bron? A. Yes sir.

Q. That was all that was said? A. All that amounted to anything.

Q. That you were to do that excavating in the first instance for 25c a yard, and afterwards on account of the difference in the haul you was to have 35c a yard? A. Yes
101 sir.

Q. That was the whole contract? A. Yes sir.

Q. He met you at the Bitting building? A. Charley did.

Q. What day was that? A. 2d.

Q. What day of the week? A. Monday.

Q. Now then, you and he met there at that time? A. Yes sir?

Q. And he told you that he had to go to work there the next morning? A. Yes sir.

Q. And then on Tuesday you and he went up? A. Yes sir.

Q. And you went up there at 8 o'clock? A. Somewhere near 8.

Q. About 8? A. About.

Q. What was the first thing that you and Charley did up there? A. Well, the stakes wasn't just right, and we measured around there and straightened the south wall up, lined it a little better.

Q. Lined that up? A. And went to work, I did.

Q. Now then, what kind of stakes were put down? A. I think they were pine, I do not remember exactly just the—

Q. How did you drive those stakes? A. Well, I do not remember. I suppose we stuck the pick in or something that way. I do not remember exactly how.

Q. Now, it waa cold that day, wasn't it? A. Yes it was.

Q. It was below zero, wasn't it? A. I expect it was,
102 we didn't have any thermometer there.

Q. But your common sense tells you it was below zero? A. I would think it was.

Q. You quit at 10 o'clock? A. Somewheres near it; I don't remember the exact time.

Q. Now then, how long did it take you and Charley to fix those lines? A. Not very long; probably 15 or 20 minutes; something like that.

Q. And you think you took a pick and dug through the frozen ground to make a place to stick down the stakes? A. I think we did likely.

Q. How deep was that ground frozen, Mr. Underwood? A. Well, it was various depths; there was crabgrass and leaves in some places, while there was a bare spot that would be frozen deeper than others.

Q. 6 or 8 inches? A. 6 or 8 inches, I think.

Q. Now then, what did you do there that morning? A. I hauled one loan and a piece, I think.

Q. What? A. I hauled one load of dirt and a part of another.

Q. And then in other words, you didn't pick up any loose dirt, did you? A. Nothing only what was picked loose.

Q. You simply took a pick and picked up clods? A. Yes sir.

Q. And threw them in the wagon? A. Yes sir, and hauled one load and a part of a load, I think, I couldn't remember exactly what I did do.

Q. Did you go down through the frozen earth?
103 A. Yes sir.

Q. How far? A. Well——

Q. Did you use any shovel? A. No, it was froze too deep to shovel; I picked it and throwed it in the wagon.

Q. How much of a space, Mr. Underwood, did you clear on that flat? A. We didn't clean off much; as near as I remember we ran along the line as near on the south side as we could.

Q. How close. Would it be 18 inches wide? A. Well, something that way. Just simply line it out.

Q. Ten or twelve feet long? A. Well, I don't remember exactly.

Q. Just give me your best opinion. A. Well, it kind of impresses my mind that I just ran from one stake to the other along the south line.

Q. How many stakes were there on the south? A. Two.

Q. That was 36 or 38 feet? A. Something that way, I don't remember exactly.

Q. That was at the rear end of the building? A. No, the cellar was nearly to the center.

Q. The cellar was nearly to the center? A. As well as I remember.

Q. Well, how far back from the front of the lot? A. Well, I couldn't say.

Q. Well, I suppose about 15 or 25 feet, wasn't it in the front of the building? It was back from the street how far? It didn't set on the street line? A. No. it didn't set on the street line, but I don't know just how the building was built over the celler.

Q. The entire building was about somewhere about 35
104 feet wide and about 75 feet long, aint it? A. I don't know anything about that.

Q. Now this cellar was somewhere about the center of the building? A. Yes, somewheres near.

Q. Then you just picked about 18 inches wide from one stake to the other that morning? A. That was the best of my knowledge now.

Q. About 5 or 6 inches deep? A. Yes, through the frozen ground.

Q. That made one load and a part of a load, and then you quit? A. Yes, and I went home; it was too cold.

Q. You went up there you say next morning? A. Yes sir, and Mr. Jones.

Q. Now, that was on Wednesday A. Yes sir.

Q. That is right, aint it? A. Yes sir.

Q. You talked to Charley on the 3d? A. Yes sir.

Q. Went up there the next day? A. Yes sir.

Q. Who was up there then? Jones, my partner.

Q. Your partner? A. Yes sir.

Q. Now what was the state of the weather that day? A. Well, it wasn't quite so cold. We worked that day.

Q. Well, was it anywheres near zero? A. Well I expect it was; I don't remember.

Q. Now were you and he there all that day? A. Yes
105 sir.

Q. Did you have your teams? A. Yes sir.

Q. Did you do anything except pick with a pick that day? A. Well, I expect we did that day maybe get down through the frozen ground that day so we could start the work.

Q. You didn't have any use—that is in the morning, wasn't it? A. In the morning.

Q. And of course you had to peik with your picks to get through the frozen ground before you could commence to use the shovel at all, didn't you? A. Yes sir.

Q. Did you work all day that day? A. Yes sir.

Q. And all day the next day? A. Yes sir.

Q. You and Jones? A. We had hired help that day.

Q. You and Jones? A. No, his boy was there.

Q. Mr. Jones was with you on Wednesday? A. Yes sir.

Q. Now, who was with you on Thursday? A. Some hired men and Mr. Jones' boy.

Q. Hired men, how many? A. Two.

Q. You don't recall their names? A. One of them was Nash and the other was Hill, I believe.

Q. And Mr. Jones' son? A. Yes sir.

Q. And you worked there on Thursday? A. .....

Q. The same help? And on Friday? A. Mr. Jones
106 came back.

Q. And on Saturday? A. On Saturday we had our own boys out of school to help us.

Q. You had your own sons? A. Also this hired man.

Q. Now, this $15 you received was simply on account of the job? A. Yes.

Q. Do you recollect, Mr. Underwood, when you got your last check on that, the date when you got your last payment on that work? A. No, I don't.

Q. You charged your mind with it? A. Mr. Jones there drew the last check.

Q. Do you know when he got it? A. No, I cannot say the date.

Q. You don't know anything about it? A. No date.

Q. Now then, what was the date that you had your conversation that you spoke of with Mrs. Conklin? A. Well, I couldn't tell, that was during the holidays some time. I don't remember what day it was or anything about it.

DIRECT EXAMINATION OF J. A. JONES, by Mr. Brubacher.

Q. State your name to the court. A. John A. Jones.

Q. Are you the John A. Jones referred to in the testimony as having a contract with Mr. Bron to do some excavating on Waco? A. Yes sir.

Q. You and Mr. Underwood had that contract? A. Me and Mr. Underwood had that contract together.

Q. When did you first begin the work of excavation?
107 A. Mr. Uunderwood went there on the 3d.

By Mr. Harris: I object as hearsay.

By the Court: Sustained.

Q. I will ask you what you did on the 3d of January? A. 3d of January? I hauled coal for Marlow Brothers on East Douglas.

Q. What did you do on the morning of the 4th? A. I hitched up my team and started up to work on Waco. Stopped at Mr. Marlow's out there; I had my plow and scrapers in the wagon. Ernest Marlow and Mr. Nichols, I think it was, were standing in the window and looked out at me and said, you are crazy starting out to work on a day like this. I told them I was going to work on a cellar for Mr. Bron.

Q. You then went to the premises? A. Yes sir.

Q. What was the condition of the property when you got there with reference to having excavation done when you began? A. There had been some work done on it.

Q. How much? A. I couldn't say how much, but very little.

Q. What time of the morning was it you got there on the morning of the 4th? A. I presume it must have been half past 8 o'clock when I got there; I stopped a few minutes at Mr. Marlow's and drove on up there; I presume something like that.

Q. Did you and Mr. Underwood work there on that job of excavation during January 4, 1911? A. Yes sir.

Q. And this time that you speak of and which we have been referring to is in the month of January, 1911?
107 A. Yes sir.

Q. What did you do the next day, on the 5th? A. The next day I was sick; I sent my boy to help Mr. Underwood.

By Mr. Harris: We move to strike out that the boy done work there, as hearsay.

By the Court: Sustained.

Q. And on the 6th, did you work on that job? A. Yes sir.

Q. And on the 7th? A. Yes sir.

Q. Did you and Mr. Underwood work all day on the 4th? A. Yes sir.

Q. You had a team? A. Yes sir.

Q. What did you do with the dirt? A. We hauled it back next the river back, there, and we filled up a sag there was in there.

Q. You know of money having been paid on that job, $15 on Saturday the 7th of January? A. Yes sir.

Q. Did you get any other money on that? A. That was out first money.

By Mr. Brubacher: Is it admitted that they got $50 on the 16th?

By Mr. Harris: It is.

Q. The $50 that you got of Mr. Bron on the 16th, what was that for? A. That was on the excavating there.

Q. What was the $15 that you got—that he paid you on Saturday for? A. We had a couple of hired men there and
109 it was principally for money to pay these men off on Saturday night.

Q. Who worked on the job there on Saturday? A. On Saturday there was myself and Mr. Uunderwood and my son and Mr. Underwood's son, and Mr. Nash (?) and I think Mr. Hall.

CROSS EXAMINATION, by Mr. Holmes.

Q. Mr. Jones, do you recall a conversation about a week ago with two young men that came down to see you? A. About a week ago?

Q. Yes, say two or three weeks ago. A. I recall a conversation had three or four weeks ago, I cannot say what time it was.

Q. What was that conversation about? A. To the best of my recollection there was two gentlemen came to my place there Monday morning and I wasn't at home. I came home there something in the forenoon and my woman told me there was a couple of gentlemen come there and wanted to see me.

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, not proper cross examination, hearsay.

A. And as I drove home at noon I met a couple of gentlemen on the walk up in front of my place on the walk.

Q. Would you know them if you saw them? A. I think that is one of the gentlemen right there. They introduced themselves, but I don't know as I could recall their names. I think that is the gentleman right there. They told me their business there and wanted to know about starting this work.

Q. Did you tell him? A. I did.

110 Q. Did you not state what you were doing on Wednesday of the first week in January? A. I think not.

Q. Did they not ask you about that? A. I think not.

Q. Did you not state that on Wednesday you were sick?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial.

By the Court: Overruled.

Q. Did you not state that on Wednesday you were hauling coal there A. I do not remember that at all.

Q. Did you not state that on Thursday you was sick? A. I do not think I did.

Q. Is it not a fact that you were sick on Thursday. A. Yes sir, I was sick on Thursday.

Q. Did you not state that you were sick—that you were

hauling coal on Wednesday? A. I didn't tell those boys anything about my being sick.

Q. You didn't tell them anything about your being sick? A. No sir.

Q. Did you not state that you were hauling coal on Wednesday the 4th of January, and that on Thursday you were sick? A. No sir.

Q. Did you not state that on Friday you sent some one up to commence the work, your son? A. I told them like this, they asked me what time I commenced this work up there; I told him it was some time the fore part of the month, but at that time I couldn't give the date.

Q. But did you not state that you knew as to the days of the week? That on Wednesday you were hauling coal? A. They didn't ask me that, just thanked me and went off.

Q. Did you not tell them that on Wednesday you were
111 hauling coal? A. No sir.

Q. Did you not tell them that Wednesday you were sick? Is that not right? A. I don't think I did.

Q. Did you not tell them that on Friday that was the time you sent them up there to commence work? A. No sir.

Q. Did you send Underwood and your son up there on Thursday? A. I sent my son up there to meet Mr. Underwood.

Q. On Thursday? Did you have any memorandum by which you could fix the date now if you could not fix them then? A. I wanted to wake up my recollection and get together and see what I was doing at that time when I did commence.

Q. Didn't you have any written memorandum? A. No sir, I didn't.

Q. You simply dug in your memory? A. I didn't know about the dates they referred to. I went back to the dates where I knowed I had worked, when it was. Right at the time they spoke to me I hadn't given it any thought. They simply approached me and I hadn't never thought of it.

CROSS EXAMINATION, by Mr. Harris.

Q. Is this the other young man that was there at the time? A. I wouldn't be positive, but I would think he is.

By Mr. Brubacher: Now we object unless leave is obtained for double cross-examination.

By the Court: What new feature do you want to examine him about? I am trying to save some time. Yet Mr. Holmes finish the examination.

By Mr. Holmes: I will finish.

CROSS EXAMINATION, continued by Mr. Holmes.

Q. Now, Mr. Jones, you proceeded up there on Wednesday

or Thursday morning—which was it? A. Wednesday morning.

Q. How cold was it? A. Well, it wasn't as cold as it
112 had been prior to that.

Q. Was it below zero or above? A. I didn't have no thermometer to go by; it was cold enough.

Q. How was the ground? A. The ground was froze the same as usual.

Q. The same as usual in January or July? A. In January, I judge.

Q. How deep? A. 5 or 6 inches.

Q. What did you do with the plow there? A. We didn't do anything.

Q. What with the shovel? A. Nothing much except throw a few small clods in the wagon.

Q. How did you get those clods up? A. We picked them up in big chunks and throwed them in the wagon with our hands.

Q. How did you get them up? A. With a pick.

Q. Did you haul anything to the river that day? A. Yes we did.

Q. How much? A. Well I don't know how much we did haul; we hauled all day.

Q. How much in the morning? The morning of the 4th? A. I don't know; I judge we hauled 15 loads probably.

Q. How much is there in a load? A. A yard and a half.

Q. Do you mean to say that with a pick, then, you picked out 15 loads of dirt in the morning of the 4th? A. In all; myself and the bunch of us did.

Q. How many was there? A. I think there was four.

Q. Who were they? A. There was Mr. Underwood and
113 myself, Mr. Nash and Mr. Hall.

Q. Now wasn't that on the Friday instead of on Wednesday? A. No sir.

Q. How do you know that? A. Because it was the 4th that I was there, the first day I was there.

Q. Did you hear Mr. Underwood's testimony? A. Yes sir.

O. Did he not say it was on Friday that Hall and Nash was there?

By Mr. Brubacher: We object as argumentative, assuming a fact not proven.

By the Court: Overruled.

A. Mr. Nash was there on Friday also.

Q. Did Mr. Underwood say that Mr. Nash was there on Wednesday?

By Mr. Gardner: We object as argumentative.

A. I think Mr. Nash was there Wednesday, I wouldn't be positive about that.

Q. Was Hall there on Wednesday? A. I think they was both there on Wednesday.

Q. What were you paying them? A. A dollar and a half a day.

Q. And on Thursday you don't know how many were there? A. On Thursday there was those two boys I had hired, and my son and Mr. Underwood was there.

Q. Did you allow yourself anything in the way of pay? A. That day?

Q. Yes. A. That boy took my place.

Q. On Wednesday, did you allow yourself anything in the way of pay A. Why sure.

Q. How much? A. Well, we figured up all of the ex-
114 penses, we got whatever was left out of the expense when the work was done.

By Mr. Brubacher: May I ask the witness a question in rebuttal? They asked on cross examination how he refreshed his memory. I would like to know in what way he refreshed his memory—

By the Court: No, I think not, he said he dug it up.

DIRECT EXAMINATION OF CHARLES BRON, JR., recalled, by Mr. Brubacher.

Q. Mr. Bron, what did these Waco Street flats cost independent of the ground? A. Waco cost $13,000, between 3 and 4 hundred dollars.

Q. And you paid $4,500 for the ground? A. Yes sir.

Q. Was that about the relative value of the property at the time it was sold by the trustee?

By Mr. Holmes: We object, incompetent ,irrelevant, and immaterial, and as to the value at the time of the sale had nothing to do with the value at the time of the deed.

By the Court: I will hear evidence on this question.

By Mr. Harris: We object to that for the reason that this witness is not competent to testify as to the value of that property.

By the Court: Sustained.

Q. Mr. Bron, what has been your experience in buying and selling real estate in Sedgwick County, in the last two years? A. I know this, every transaction that has been made, I have information of it.

Q. Whatever transaction has been made by your father? A. Yes sir.

Q. Have you kept advised pretty carefully as to the

115 value of real estate in Wichita during the last three years? A. Yes sir.

Q. And your father has bought numerous pieces of real estate, has he? A. Yes sir.

Q. You sold them? A. Yes sir.

Q. And he consulted with you at the time of the prices, and at the time of the sale? A. Yes sir.

Q. And were you consulted with reference to the buying of the 48 feet on Waco Avenue from Mr. Conklin at the time it was bought? A. Yes sir.

Q. You know of that transaction? A. Yes sir.

Q. Do you know what the fair and reasonable value of that property was, say in the latter part of December, 1910, and fore part of January, 1911, by reason of your experience in buying and selling?

By Mr. Harris: We object as incompetent, irrelevant, and immaterial; it has been shown that he bought the property for $4,500, and they can't prove it was more or less.

By the Court: You may stand aside, Mr. Bron. I will hear you gentlemen on this proposition of law. It is no use taking this evidence unless it is going to be applicable.

Thereupon this witness is excused to be recalled at 2 o'clock, and it is ordered that the further testimony of the witness be continued at this point.

116 Direct examination, continued.

Q. You have stated, Mr. Bron, that the improvements independent of the land cost between thirteen thousand three hundred and four hundred dollars, and that you paid $4,500 for the land independent of the improvements? A. Yes sir.

Q. Now I will ask you whether or not in your judgment that was the relative value of the improvements as compared with the land, as of the date that the property was sold by the trustee.

By Mr. Holmes: We object as incompetent, irrelevant and immaterial and for the further reason he was asking for the relative value and the question is not as to the relative value, but as to what are the values.

By the Court: Sustained.

Q. Do you know what the reasonable market value of the land was independent of the improvements when the property was sold by the trustee?

By Mr. Holmes: We object as incompetent.

A. I think I do.

By Mr. Holmes: And that that is not the way to measure the value of the property.

Q. State what in your opinion is the fair and reasonable value of the land independent of the improvements, at the time the property was sold by the trustee.

By Mr. Holmes: We object, incompetent, and not proper way to ascertain the measure of value of the improvements independent of the property.

By the Court: Sustained.

By Mr. Brubacher: Exception.

Q. What in your opinion was the fair and reasonable value of the improvements on the property independent of the land, at the time the property was sold by the trustee.

117 By Mr. Harris: We object as incompetent, irrelevant and immaterial, not the proper method to measure the value of that property.

Q. Do you know what the fair and reasonable value of the improvements were at the time the property was sold by the trustee, independent of the land; answer that yes or no. A. Yes.

Q. State what in your opinion they were worth at that time.

By Mr. Harris: We object for the reason last stated. Incompetent, irrelevant, and immaterial, for the reason that the time fixed by counsel is not the proper time for the measurement of the value of the improvements.

By the Court: Sustained.

Exception.

Q. Do you know what the fair and reasonable value of the improvements were, Mr. Bron, independent of the land itself at the time of the completion of the building? Answer that question yes or no. A. I do.

Q. You may state what they were at the time of completion of the building. A. They are worth more than they cost, surely.

Q. State how much.

By Mr. Holmes: I object to that as incompetent, irrelevant, and immaterial, not the proper way of ascertaining the interest of the parties.

By the Court: I will receive this subject to whether or not it is competent under the intention that you want to defeat the liens possibly on the land separate and apart from the improvements.

Q. Just answer in dollars and cents what in your opin-
118 ion the improvements were worth. A. Well, I think they were worth more than the cost. They cost thirteen

thousand, between three and four hundred dollars, actual cost.

Q. Well, how much more than that would they be worth in your opinion?

By Mr. Harris: I object to that for the reason that the improvements placed up there cost a certain amount of money, and as far as these lienholders are concerned, could not be worth more than they cost.

Q. In your judgment, Mr. Bron, would the improvements be worth what they cost at the time of the completion of the building, independent of the land? A. Yes.

By Mr. Holmes: We object to that, it is incompetent, irrelevant, and immaterial, that it isn't the proper way and method of ascertaining the value of the land nor is it the proper method of ascertaining the respective rights of the lien claimants herein.

By the Court: I will sustain that objection.

Exception.

Q. Mr. Bron, do you know what that fair and reasonable value of the property was with the improvements at the time of the completion of the building? A. I do.

Q. You may state what that was.

By Mr. Holmes: We object because the question is immaterial, incompetent, and irrelefant, and for the further reason that it is not the proper manner and method of ascertain-
119 ing the relative rights nor the value of the property.

By the Court: Sustained.

Mr. Brubacher: Exception.

Q. Do you know what the fair and reasonable market value of the land was at the time of the completion of the buildings independent of the improvements? A. I do.

Q. State what it was.

By Mr. Holmes: We object as incompetent, irrelevant and immaterial, not the proper manner of proving the values nor of ascertaining the rights of the parties.

By the Court: Overruled.

By Mr. Holmes: Exception.

A. It was about $2,200.

Q. Now what in your judgment was the fair and reasonable market value of the property at the time of the completion of the building with the improvements? A. With the improvements, well the improvements cost—

Q. I do not care what they cost.

A. They were worth about $15,000, five hundred or six.

Q. Now, do you know what the fair and reasonable market value of the land was independent of the improvements at the time of the sale of the property by the trustee? Answer that question yes or no.

By Mr. Holmes: We object to that as having been asked before and the objection having been sustained.

By the Court: Sustained.

Exceptions.

120 Q. Now I will ask you if there was any change in the market value of these improvements or as to the lots, from the completion of the building to the time when the property was sold.

Objection.

Overruled.

A. I believe it depreciated. Yes.
Q. Well, what change?

By Mr. Holmes: We object as incompetent, irrelevant and immaterial, not proper cross examination, not the way to ascertain the measure of values.

Q. Now what in your opinion was the depreciation in the value from the time of the completion of the building to the time the property was sold?

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial, not the proper way of ascertaining the value nor the proper method of ascertaining the rights of the parties in these proceedings.

By the Court: Sustained.

Q. Do you know, Mr. Bron, whether there was any depreciation in the fair and reasonable value of the property either as to the lots or as to the improvements from the time the building was completed to the time of the sale by the trustee?

By Mr. Holmes: We object to that, if your Honor please, as not the proper way to ascertain the rights of the parties, incompetent, irrelevant and immaterial. That kind of question is not proper cross examination.

By the Court: I think that question is entirely suggestive.

121 Q. Do you know, Mr. Bron, whether there was any change in the fair and reasonable value of the property either as to the land or as to the improvements, from the time of the completion of the building to the time the property was sold by the trustee? A. I do.

Q. Now state what that change was in your opinion; was it an increase or a decrease in value? A. That was a decrease.

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial, not the proper way to ascertain values, and not a proper method of ascertaining the rights of the parties.

By the Court: You may answer.

A. The property decreased.
Q. During that period? A. Yes sir.
Q. How much in your judgment?

Objection.

By the Court: He may answer.

A. I think ten or fifteen hundred dollars.
Q. That is, that decrease, ten or fifteen hundred dollars, applies to the land, or the improvements, or both? A. To both.

By Mr. Holmes: Same objection.

Q. What part of the decrease, in your opinion, would apply to the land, and what part to the improvements?

By Mr. Holmes: Same objection.

By the Court: Same ruling.

A. I think the land has decreased more than the property.
122 Q. What in your judgment—well, to what extent?

By Mr. Holmes: We object to that as not a proper method of proving values.

By the Court: I think that is objectionable.

Q. How much in your judgment has the fair and reasonable market value of the improvements decreased from the time of the completion of the building to the time of the sale by the trustee?

By Mr. Holmes: We object to that as improper way to prove values.

By the Court: He may answer.

By Mr. Holmes: Exception.

A. Not over two or three hundred dollars.
By the Court: The evidence of the witness now on the stand given since convening of the court at 2 o'clock, will be stricken out as not applicable to any issue now being determined.

By Mr. Brubacher: To which the mechanics lien claimants object and save an exception.

. . . . . .

DIRECT EXAMINATION OF FRANK HOFF, by Mr. Brubacher.

Q. Mr. Hoff, you are a plumber? A. Yes sir.

Q. You did some work on what is known as the Waco Street flats, now under consideration, in the way of repairing a sewer, did you not? A. Yes sir, we changed a sewer.

Q. What day was that? A. The 11th of January.

Q. 1911? A. Yes sir.

123 Q. When did the sewer break, if you know? A. It was broke a couple of days before and the cellar was very near dug. When I was up there, it was all dug except spading out the corners where the sewer went through it.

Q. You have a book by which you know? A. Only the time slip of the man that done the work—

Q. I hand you paper marked Exhibit G (?). State what that is, Frank.

(Witness reads.)

A. January 11, 1911, Mr. Bron's flat, north Waco, January —Mullen 8 hours the 11th, 8 hours the 12th, 4½ hours the 14th of January. Fisher, 11th, 3 hours, Fisher 12th, 8 hours, and the 13th 6 hours; and the German boy 8 hours.

Q. 11, 12 and 13 means January 11th, 12th and 13th? A. Yes sir, started January 11th, 8 hours.

Q. You were there? A. Mr. Bron sent for me, and I went up the 10th and saw the condition of the work.

Q. You saw the condition of the cellar on the 10th of January? A. Yes sir.

Q. And that sewer broke on the 10th? A. A couple of days before. Mr. Bron told me.

By Mr. Harris: I move to strike out the answer to that question as heresay of Mr. Bron.

Q. On the 10th? A. It was broke when I went up there. Of course that was the 10th in the afternoon. It may have been the 10th in the morning for all I know.

Q. What was the condition of the cellar on the 10th? A. It was 5 feet deep and about squared off level on the bottom except the corners of the cellar.

124 Q. Was that the full depth of the cellar, or do you know? A. I couldn't tell you. The way it looked to me it must have been finished, the way it was leveled.

CROSS EXAMINATION by Mr. Holmes.

Q. You testified that you recalled what work was done when you went down there on the sewer. A. Yes.

Q. Was that not by reason of refreshing your memory? That it was on the sewer?

Q. You had these time slips with you to—

By Mr. Brubacher: The stenographer's record will show that he testified without.

A. Yes sir.

By Mr. Brubacher Let the record show this query: Will the court make a finding upon the question of priorities as to the amount of the various mechanics liens and the mortgage liens?

By the Court: The court will not be examined. I will make a finding of the allowances or rejection of all claims, common and secured, whether mechanics liens or mortgages, and establish the priorities, whatever the facts may warrant as I see them.

Thereupon the mortgage lien claimants submitted evidence as follows:

By Mr. Harris: The mortgage lien claimants offer in evidence, identification being waived, the state of the weather as given by Richard H. Sullivan, local forecaster for the United States Department of Agriculture, located at Wichita, Kansas, as to the full month of January, 1911, and the month of
125 December, 1910.

Mr. Brubacher: We object to the full month as immaterial.

By the Court: It would have to be copied on the machine.

Mr. Brubacher: I will withdraw my objection.

DIRECT EXAMINATION OF W. E. HOLMES, by Mr. Holmes.

Q. What is your name? A. W. E. Holmes.

Q. Have you ever seen the witness J. A. Jones before? A. Twice.

Q. At what time and place have you seen him first? A. About three weeks ago at his place of residence on South Ellis.

Q. Was any one with you? A. Mr. Black.

Q. Will you state whether at that time he told you that he was hauling coal on Wednesday of the first week of January, 1911?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, no sufficient foundation having been laid for impeachment.

By the Court: Overruled

Exception.

A. Yes sir.

Q. Will you state whether at that meeting he told you that on Thursday of the first week in January, 1911, he was sick?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, no sufficient foundation having been laid for impeachment.

Overruled.

Exception.

126 A. He did.

Q. Did he at that time tell you that he had looked up the matter carefully when you talked about it?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, no sufficient foundation having been laid for impeachment.

Sustained.

Q. Did he state to you that on Thursday, of the first week of January, he sent up his son and Mr. Underwood to commence the work on that building?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, no sufficient foundation having been laid for impeachment; leading and suggestive.

Overruled.

A. He did. He said he sent up his son and Mr. Underwood. That was on Thursday. He wasn't certain whether they went there and did any work.

CROSS EXAMINATION, by Mr. Brubacher?

Q. You are the son of Mr. Holmes, one of the attorneys? A. Yes.

Q. And you are an attorney. A. Yes.

Q. When was it that you went down to see Mr. Jones? A. Somewhere about three weeks.

Q. Can you give the time? A. I can give the time of day, not of the week.

Q. That is what I am talking about. A. Noon.

Q. You cannot give what day it was? A. No.

Q. Was it in this month? A. It was the very first of the month if it was.

Q. Do you remember definitely whether it is the first of the month or the last of October? A. No.

127 Q. You don't remember whether it was the first of November or the latter part of October that you were there? A. No.

Q. You heard Mr. Jones testify, did you not, that at the time you were there you were talking to him, that he didn't give the matter any thought or consideration, and that subsequently he refreshed his memory? A. I heard him make that statement.

Q. On the witness stand? A. Yes sir.

By Mr. Brubacher: We move the court now to strike out the testimony of this witness for the reason that it affirmatively appears that no sufficient foundation has been laid for impeachment, in this respect: The witness himself does not know the date when he had this conversation, and hence it could not have been drawn out of Jones that the same conversation that Jones was interrogated about is the conversation that the witness is talking about.

By the Court: Overruled.

DIRECT EXAMINATION OF R. E. BLACK, by Mr. Holmes.

Q. What is your name? A. R. E. Black.

Q. Have you seen the witness J. A. Jones before? A. Once before today.

Q. Where was it? A. At his home—his residence.

Q. About how long ago? A. Either in approximately
128 the last week of October or the first week of this month.

Q. At that time, did Jones tell you that on Wednesday of the first week of January, 1911, he was hauling coal.

By Mr. Brubacher: We object to that as incompetent, irrelevant, and immaterial, no sufficient foundation has been laid for impeachment, for the reason that the witness Jones' attention was not called to the time now the witness is being questioned about, nor to the conversation.

Overruled.

Exception.

129 A. Yes sir. He stated that on Wednesday of that week he was hauling coal.

Q. Did he not state at that time that he was sick on Thursday of the first week of January, 1911?

By Mr. Brubacher: We object to that as incompetent, irrelevant and immaterial, no sufficient foundation has been laid for impeachment.

Overruled.

Exception.

A. He did.

Q. Did he not state at that time that on Thursday of the first week of January, 1911, he sent his son and C. L. Underwood to commence the work?

Same objection.

Overruled.

Exception.

Q. Upon the Waco flats? A. He stated that he sent his son and Underwood to work that week, but wasn't sure whether they worked or not.

130 CROSS EXAMINATION, by Mr. Brubacher.

Q. What is your business? Mr. Black? A. Manager of the Beacon Building.

Q. How did you happen to be down there? A. When I went out about noon that day and Mr. Holmes, Junior, a particular friend of mine, said he had an errand, and we went out.

Q. How did you go out A. Street car. We met Mr. Jones just as he was coming in from work at noon. He was driving in the wagon.

Q. What were you going there for? A. With Mr. Holmes; he had an errand.

Q. Did you know what his errand was? A. I knew he was going to question Mr. Jones regarding those days.

Q. And he took you as a witness? A. For company. We were always together at the noon hours.

Q. Did you know he was taking you as a witness? A. He asked me to pay particular attention to the conversation, which I did.

Q. You heard Mr. Jones testify, did you not. A. I was not here during that testimony.

Q. Didn't you see Mr. Jones on the stand? A. Just the last part of his testimony? A. No.

DIRECT EXAMINATION OF P. J. CONKLIN, by Mr. Holmes.

Q. What is your name? A. P. J. Conklin.

Q. You and this Mary Conklin are husband and wife? A. Yes sir.

Q. Where were you living in the month of November, 1910, and January, 1911? A. 901 Waco Avenue.

131 Q. How far were you from the—what is known as the Waco flats, being the property in controversy in this case, were you living? A. 8 or 10 feet.

Q. What direction from the home where you were living? A. Just north.

Q. Will you state, Mr. Conklin, whether you did the negotiation for the sale of this property with Mr. Bron? A. I did.

Q. Will you state the circumstances—will you state what was said—what was the agreement, if anything, verbal agreement, between you?

By Mr. Brubacher: We object as calling for conclusion of the witness and asking for a conversation.

Q. What was the conversation between you and Mr. Bron with respect to a sale of this property. A. The sale of this

property hinged upon whether or not a mortgage was to be made upon a ranch in Sumner County, and the sale of the south flat which he was going to sell. He wanted to talk about purchasing the property before then, but he couldn't buy this until he made a loan on the Sumner County land. He——on the 21st of December, and then he came to me and I think it was the following day we made a contract on the land—that is got an agreement.

Q. State what was the conversation at that time with respect to the sale of this property, the 21st day of December, 1910. A. 22d, wasn't it? Just a general conversation there; it was generally understood, however, that there was nothing to be done on the property—I was to—

132 By Mr. Brubacher: We object to what was understood.

By the Court: Narrate the conversation that took place.

A. I was to take a second mortgage back on the property. I was to get $4500 for the property if it was paid within a year. Then I was to accept in payment a second mortgage subject to a mortgage of $7500, and when the conversation came up I told Mr. Bron that when that deal was made we would have to have out mortgage that he was to give back for the purchase price, we would have to have that as a first—a prior—before any work commenced, that no work should be done on that flats at all, nothing should be done until out mortgage was of record.

Q. State whether or not you were to have a lien second to $7500. A. Yes sir.

Q. Was that the—was any change in the terms of that agreement after that before the deal was closed? A. No sir.

Q. Will you state whether you know—states yes or no—do you know when the deed was delivered? A. I do.

Q. Will you state the circumstances connected with the delivery of that deed, and when? A. The deed was delivered on the 4th, in the forenoon. Mr. Kimball, of course, insisted on his mortgage going on first, and mine was to follow it, and Mr. Bron came with his wife into my office on the morning of the 4th and executed the papers. He told me that he had already been to Kimball's office and executed the papers there, and I think Mr. Bron was still present when Mr. Sargent, a clerk of Kimball's came to my office and asked for the papers, stating that the first mortgage had been recorded, and he wanted Mr.

133 Bron's deed to go on record before his mortgage went on record.

Q. Did he state that his mortgage had been recorded or executed? A. Had been signed.

Q. What was done with the deed on that morning? A. I turned it over to Mr. Sargent.

Q. Had your mortgage been executed at that time? A. It had either been executed, or they were still signing it. They

were in there at that time, or had just gotten through.

Q. Had the deed been previously signed by you and Mrs. Conklin? A. Yes sir, the deed had been signed the day before, executed the day before.

Q. You mean by executed, signed and acknowledged? A. Yes sir.

Q. But there was no delivery of the deed on the 3d day of January, 1911?

By Mr. Brubacher: We object as leading and suggestive, and calling for conclusion of the witness.

By the Court: A little suggestive and leading; it will be sustained. Make it clear; this witness don't need to be prompted.

Q. Did you have possession of the deed during the time after it was signed by Mrs. Conklin until the morning of the 4th of January, 1911? A. Why it was in my office.

Q. It wasn't out of your office during that time? A. I do not think it was; I didn't have any knowledge of it being out.

Q. Will you state whether at that time, to-wit, on the morning of the 4th day of January, 1911, there had been any work done upon the house which is now known as the Waco flats? A. No work done on it—no sir none.

Q. What was the condition of the weather at the time of the execution or rather the signing and acknowledgment
134 of the deed, on the 3d day of January, 1911? A. It was so bitter cold my wife couldn't come down to the office on the 3d, and the deed was taken out to the house for her signature.

Q. Do you know who took the deed? A. Yes sir; my son-in-law, Mr. Ginzel.

Q. Do you know what time of the day that deed was taken up? A. He went about 1 o'clock, and he took it with him—he took the deed with him when he went to lunch.

Q. Do you know who took the acknowledgement? A. I do.

Q. Who did? A. A. O. Conklin, my son.

Q. Do you know whether there were any trees upon this particular piece of property that was afterwards converted to the Waco flats, before the house was commenced? A. Yes sir, there were lots of trees there.

CROSS EXAMINATION, by Mr. Brubacher.

Q. You say there were some apple trees there? A. No sir, fruit trees and shade trees. There were a lot of trees there, I said.

Q. I beg your pardon. When were these trees removed? A. My recollection isn't quite clear, but I can give you a cir-

cumstance that fastens it in my mind, if you want to hear that.

Q. If you don't remember, Mr. Conklin, we will not ask you to state other matters. A. I know positively when it had not been done, but I don't know just what day it was done.

Q. Do you know whether any of these trees had been removed during the holidays? A. They hadn't.

Q. Do you know whether any of the fencing had been removed during the holidays? A. I do not remember of
135 any. It might have been, but I don't—

Q. There was some fencing there? A. Yes sir, some chicken-yard fence, but I don't think there was, I don't hink there was anything there. The trees I know because I had it fixed in my mind from other circumstances.

Q. Did you say that Mr. Jones and Underwood were not up there during the holiday and did some work on it towards removing the obstructions, necessary for the excavation? A. I didn't say that.

Q. Well, are you not saying that you don't know anything about it? A. I didn't know if any trees were cut down.

Q. I am asking if there was work done there during the holidays? A. I do not know.

Q. You had this conversation with Mr. Bron on the 22d? Relative to buying this ranch on this property? A. Relative to the consummation of the deal, that is, the final agreement, whether he was taking it not.

Q. Did you have a written agreement? A. No sir.

Q. Did you give him an abstract at that time? A. I do not know at that time, but know I gave it to him soon after.

Q. And he had it examined? A. I suppose so.

Q. And on or about the 31st day of December you drew up a deed for this property? A. Yes sir.

Q. And up to that time there were a couple of mortgages on it. A. Yes sir.

136 By Mr. Holmes: We object as not proper cross-examination.

By the Court: Overruled.

Q. How much were those mortgages on the property? A. There was two original mortgages on the property of $3000 each, but one of them had been partially paid.

Q. I refer to the Waco property. A. Yes sir, there was two mortgages of $3000 each.

Q. And how much was there due, if you remember?

By Mr. Holmes: We object as immaterial.

By the Court: Sustained.

Q. How did you happen to draw up the deed on the 31st of December? A. Because New Years was a holiday; we date

all our papers the first of each month, and we didn't want to do it on the holidays. We dated it the 31st of December; we could have dated it the 2d of January, but that was a legal holiday. So we dated the 31st of December.

Q. Why regard the 2d of January a legal holiday? A. Because I don't know if it was recognized, we simply took the 31st of December.

Q. So you drew up the mortgages and dated them the 31st, and also the deed, and dated that 31? A. I do not remember the date the papers were drawn up, but they were dated that day, I know, that is, the mortgage was dated that day, but I don't know the date the deed was dated.

Q. Well, I believe it is admitted in evidence here that the deed bears date the 31st of December, that would be correct? A. It would be correct if it shows that, certainly.

Q. And it was acknowledged the 3d? A. Yes sir.

137 Q. By you and your wife? A. Yes sir.

Q. What was the special reason why it was acknowledged on the 3d of January? A. Why I don't know whether there was any special reason for it at all.

Q. Who was this young man that took the deed up to your wife? A. My son-in-law, Mr. Ginzel.

Q. Did he make a special trip for that purpose? A. No sir, he was going home for lunch.

Q. He boarded with you? A. No sir.

Q. Lived with you? A. No sir, he lived in Riverside, but he had to go with a block of the house to go home.

Q. You could have had it signed up that evening yourself? A. My wife was ill, and she couldn't come down.

Q. You go home at night? A. Yes sir.

Q. You could have taken it with you? A. I could.

Q. And taken it up? A. Yes sir.

Q. You knew Mr. Bron was coming to sign it up tomorrow, didn't you? A. I don't remember anything about that.

Q. Well, he didn't sign it up until January 4th? did he? That's your testimony. A. No sir, he didn't.

Q. Now explain to the court ,why you didn't get your wife to sign it up that evening, January 3d, and have it in your office on the 4th when Mr. Bron came in and signed up the mortgage. A. I don't know about that.

138 Q. Did your son-in-law bring back the deed that afternoon. A. He did.

Q. What time did he get back? A. I judge about 2 o'clock.

Q. Did you see Bron that day? A. Mr. Bron was in the office that day, and made an excuse for not bringing his wife down because it was cold. Said she would be down the following day.

Q. You say you don't remember about it having gone out of the office? A. Except for my wife's signature.

Q. Do you know whether Mr. Bron needed the deed for any reason to draw up the papers? A. I do not know.

Q. May he not? A. Certainly he might.

Q. In that event somebody would have to take it up to Mr. Kimball? A. Yes sir.

Q. And Mr. Bron would not be an undesirable person to take the deed up, I imagine? A. I trusted Mr. Bron.

Q. You had trusted him on other occasions with deeds under similar circumstances?

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial.

By the Court: Sustained.

Q. So the deed wasn't taken out of your office that afternoon? A. I couldn't swear positively. I don't think it was.

Q. Now, I believe you said, Mr. Conklin, that no work had been done on the property on January 4th, the morning that you left there? What time did you leave? A. I usually got out of the office about 8 o'clock.

139 Q. So you probably left before 8? A. Yes sir.

Q. And when you saw that no work had been donw upon the morning of the 4th, do you mean to say—I will withdraw that—do you mean to say that no work was done on the day of the 4th? A. Noto to my knowledge.

Q. Do you know it to be a definite fact that no work was done there, excavating there on the day of the 4th? A. To the best of my knowledge and belief, there hadn't been on this morning of the 4th.

Q. You might have been mistaken? A. On that day it is possible, but it is probable.

Q. Do you go home for dinner? A. No sir.

Q. So if there was work done there on the 4th it may have started as early as 8 o'clock in the morning? A. Yes sir, there is a possibility of a thing of that kind, but as far as my testimony goes—

Q. Did you see men working there on the 5th? A. I did not.

Q. Where were you? A. I was at home and at my office.

Q. Did you see any evidence of work there on the 5th? A. No sir.

Q. Did you see any men working there on the 6th? A. I couldn't say.

Q. On the 7th? A. I think the latter part of the week they were doing some work there, but I couldn't say.

Q. Do you know how far it had advanced on Saturday? A. A very, very little way, if it had advanced at all.

Q. You don't know whether any work was done on Saturday? A. No sir.

Q. You wouldn't swear there had been? A. No sir, I
140 wouldn't swear there had been on Saturday.

Q. When was that cellar completed? A. That cellar wasn't completed until after the middle of January.

Q. How long after the middle of January? A. It wasn't completed but not I can't give the exact date, anything of that kind, but I judge it wasn't completed before the 20th, if it was completed then.

Q. What was the condition of the cellar when that sewer broke?

By Mr. Holmes: We object as improper cross examination.

By Mr. Brubacher: I think so myself.

Q. Now I understand you to say, Mr. Conklin, that Mr. Sargent came into your office while Mr. Bron was there, at or about the time he was signing up your $1,500 mortgage. A. I am not sure that Mr. Bron was in the office, but I think he was. My recollection is he and his wife were just leaving together.

Q. And Mr. Sargent told you that his mortgage was on record? A. No sir.

Q. Didn't you testify to that? A. No sir.

Q. What did you testify to? A. I testified that Mr. Sargent came down there and said the Bron mortgages had been signed and wanted to get my deed, and then take it up to the court house.

Q. Did he get your mortgage? A. No sir.

Q. Who took it up? A. Mr. Ginzel, my son-in-law.

141 Q. Did he go off with Mr. Kimball? A. No sir, he went up afterwards. Followed him up there.

Q. What time was that Mr. Bron and his wife came in the next morning? A. You mean the morning they executed the mortgage?

Q Yes. A. Well, I should judge about 10 o'clock—between 10 and 11, I whould think.

RE-DIRECT EXAMINATION, by Mr. Holmes.

By Mr. Holmes: If your Honor please, I have one question to ask that I omitted in the general examination.

By the Court: Ask it.

Q. Mr. Conklin, will you state what frontage there was in your home at the time of this verbal contract that you had with Mr. Bron? A. 210 feet.

Q. At that time? A. Yes sir.

Q. This is immediately north of your house? A. Yes sir.

Q. A part of your home? A. Yes sir.

RE-CROSS EXAMINATION, by Mr. Brubacher.

By Mr. Brubacher: I will ask to interrogate him further along that line.

Q. At the time you sold this property, or made verbal arrangements with Mr. Bron, on the 22d day of December, you knew that he was going to erect a flat there, did you. A. I did.

Q. And knew that he was buying it for that? A. I did.

By Mr. Holmes: We object as improper cross examination.

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By the Court: Sustained.

Q. Do you transact the business of your wife usually relating to real estate that she is in? A. My wife and I are one.

Q. In law and in fact? A. In law and in fact, yes sir.

Q. So whatever arrangements you might make would be made as the agent of your wife also? A. There would be no object—

Objection.

Sustained.

Q. In getting this deed and delivering it you acted for yourself and as the agent for your wife? A. Yes sir.

Q. And in all transactions you had with Mr. Bron relative to this property you acted as agent for yourself and your wife?

By Mr. Holmes: We object as incompetent, irrelevant and immaterial, improper cross examination, calling for conclusion.

By the Court: He may answer that question, but I will say to you now that I don't understand that a man or his wife can bind the other by any statements of what they did as agent for the other on homestead property. You may answer it.

A. My wife kindly consented to the sale, yes.

Q. Yes, she consented to the sale, she signed the deed, didn't she? A. Yes sir.

Q. In negotiating with Mr. Bron for the sale of this property were you not acting with the knowledge and consent of your wife. A. We talked it over, yes.

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Q. And all the negotiations that you had with Mr. Bron including the delivery of the deed whenever it was delivered, and including the putting him in possession when ever he did go into possession, you were acting as agent of your wife, with her knowledge and consent? A. My wife didn't say anything about it; she never interfered with my business at all.

DIRECT EXAMINATION OF C. L. GINZEL, by Mr. Holmes.

Q. What is your name? A. C. L. Ginzel.

Q. You are son-in-law of Mr. Conklin, are you? A. Yes sir.

Q. You work in his office? A. Yes sir.

Q. Will you state what was done by you with the deed to this property to Bron, the blank deed, on the 3d day of January, 1911? A. What I did with the deed? I took it up to Mr. Conklin's wife at 901 Waco to have her signature attached.

Q. To what point were you going at that time? A. I was coming home from lunch.

Q. You were going home to lunch, or from lunch? A. I stopped on the way back from lunch.

Q. Is that very much out of the way? A. Not very much.

Q. About what time did you arrive at the office with the deed? A. About 2 o'clock.

Q. Do you recall anything that happened in connection with that deed on the next day? Answer yes or no. A. Yes sir.

Q. Will you state what it was? A. I took it up to the
144 court house to have it recorded.

Q. About what time? A. About the noon hour—I think I took it on my way to lunch.

Q. Did you take the deed? A. No, not the deed, I didn't take the deed—I took the mortgage.

Q. What mortgage do you refer to? A. The $4,500 mortgage.

Q. Was that signed at the time you took it up? That mortgage for $4,500? A. I presume it was.

Q. When was it signed? A. It was signed that morning —I remember them coming in to sign; I don't remember seeing the signature.

Q. Did you see Philip Sargent on that morning? A. Yes sir.

Q. Do you know what he did? A. He got the deed.

Q. About what time? A. Well, it was late in the morning; I imagine it was between 11 and 12 o'clock; probably near 12.

Q. Do you know why he got the deed? A. He got it to put on record.

Q. Did he state anything in connection with it at the time? A. Well, I don't remember hearing him saying anything about it.

Q. For whom was Philip Sargent working at that time? A. For Mr. Kimball.

Q. Do you recall seeing the appearance of this property on New Years day, Sunday? A. I do.

145 Q. State the circumstances in connection with that.

A. I remember standing at the window of the dining room looking out and wondering about where the building would be placed, wondering about what trees would have to be cut down, and particularly one in front.

Q. State to the court what is the size and shape of that window. A. It is a long window that reaches almost to the ground, I imagine six inches from the ground, a long window probably ten feet long, all glass.

Q. How far is that from this property now, known as the Waco flat? A. I imagine about 10 feet, that is 10 feet south of the line of the house, I imagine.

Q. Had any trees been cut at that time? A. No sir.

Q. Who was there with you at that time? A. There was several of us there; I don't remember who they were. We were gathered there at the window looking out of the window.

Q. Did you do anything with respect to any of those trees so as to mark them or designate them for any purpose? A. We went out, I think Mr. Conklin and I went out in the afternoon and we didn't mark them, I don't think, but we picked out some trees that he was to give to me to take over to the house and plant, which I finally did after excavation had started.

Q. Had there been anything done upon the ground there in the way of cutting the trees or anything of that kind at that time? A. No sir.

Q. Did you take any of those trees or any one or more
146 of them? A. At that time?

Q. After they were dug up? A. Yes.

Q. What did you do with them? A. I took them over to the house over on Riverside and planted one or two of the trees —set them out over there.

Q. Was that after the 1st day of January, 1911? A. Yes sir.

Q. Was that after the ground had thawed sufficiently so that it could be dug up?

By Mr. Brubacher: We object to these questions as leading and suggestive.

By the Court: The last question is suggestive. It assumes it had thawed.

Q. Do you recall taking one of the trees over in a buggy? A. Yes sir.

Q. State the circumstances connected with that. A. I came over in the evening of the day that the excavation had started, and I had told one of the men that were working in there that the man that was living in the back of the house, a small house there—

By Mr. Brubacher: We object, unless he identifies the man.

A. It was a man that was called Mack.

By Mr. Brubacher: We object to the conversation with Mack.

By the Court: Overruled.

A. I told Mack, this man, to set aside the trees, one or two of them—

By Mr. Brubacher: We move to strike out the answer
147 that he told Mack to set aside one of the trees, as hearsay, incompetent, irrelevant, and immaterial, so far as these mechanics lien claimants are concerned.

By the Court: Overruled.

Exception.

Q. What was the state of the ground if you can tell, at the time you took that three away? A. The state of the ground?
Q. With respect to being frozen. A. It was not frozen.
Q. Was that after the 4th day of January, 1911? A. Yes sir, it was.

CROSS EXAMINATION, by Mr. Brubacher.

Q. You went home for dinner on January 3d? A. Yes sir.
Q. How did you go? A. On a bicycle.
Q. What time of day did you go? A. I went I suppose, about 1 o'clock.
Q. Where did you live at that time? A. Over on Litchfield Avenue, in Riverside.
Q. How far from Mr. Conklin's office? A. To my house?
Q. Yes sir. A. Oh, it's about two miles.
Q. Did Mr. Conklin tell you to take this deed up and have his wife sign it?

By Mr. Holmes: We object, not proper cross examination.

148 By the Court: Overruled.

A. I think he did.
Q. Did he tell you why he wanted it signed that particular day?

By Mr. Holmes: We object improper cross examination, incompetent.

By the Court: Sustained.

Exception.

Q. You got back with it about 2 o'clock? A. I got to the office about 2 o'clock.
Q. What did you do with the deed? A. As I remember, it, I handed it to Mr. Conklin.
Q. What were your duties there? A. Now or at that time?
Q. At that time? A. I was bookkeeper there.
Q. Did you say the deed didn't go out of the office that afternoon?

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial, not proper cross examination.

By the Court: Objection sustained.

Q. Do you know whether or not Mr. Bron got that deed on the afternoon of January 3, 1911?

By Mr. Holmes: We object as incompetent, irrelevant, and immaterial, improper cross examination.

Overruled.

Exception.

A. I do not know whether he did or not.

Q. Do you know whether or not the deed was given to him on the afternoon of January 3, 1911, by Mr. Conklin, and he took it up to Mr. Kimball's office? A. I do not know.

Q. You have no information upon that subject? A. No sir.

Q. Do you know whether or not it was brought back to Conklin's office on the morning of January 4th? A. I do not know whether it left the office.

Q. If it did, you have no information on that subject?

149 A. No.

Q. Are you a notary public? A. I am now, I was not at that time.

Noon adjournment.

DIRECT EXAMINATION OF A. O. CONKLIN, by Mr. Holmes.

Q. What is your name? A. A. O. Conklin.

Q. You are a stockholder—or rather one of the firm you may call it, of the Conklin Loan Company? A. Yes sir.

Q. Do you recall having seen Philip Sargent in the office of the company in Wichita, Kansas, on the 4th day of January, 1911? A. Yes sir.

Q. You may state the circumstances, please. A. He came in along about 11 o'clock, I should judge, wanting the deed to the land; he was going to take it up and put it on record; that is the Waco Avenue property, and stating that the first mortgage to Kimball had been executed, and he wanted to take the whole business up and put it on record.

Q. He was in the office for the purpose of getting the deed? Did he get it? A. Yes sir.

Q. Was that the morning of the 4th? A. The morning of the 4th.

Q. Do you know who took the acknowledgment of that deed? A. I did.

Q. Will you state, Mr. Conklin, if you know whether there were any changes made on that ground there in any wise prior

to January 1, 1911? A. The last date I could state would be December 29th.

Q. December 29th you were there? A. Yes sir.

Q. Had anything been done prior to that time? A. No sir.

150 Q. Were you there at any time thereafter before the building was commenced? A. Not that I remember; we were busy getting settled, and I don't believe I was up for a week or ten days.

Q. How do you fix that January 29th? A. December 29th. We moved from the home of my father down to the Sedgwick Annex on December 29th.

Q. You were there up to the Christmas Holidays? A. Up to December 29th.

Q. Nothing had been done before that time? A. No sir.

Q. This was your first housekeeping? A. Yes sir.

Q. And that is the reason why you remember it? A. Yes sir.

CROSS EXAMINATION, by Mr. Brubacher.

Q. Did you take the acknowledgment of the deed? A. Yes sir.

Q. What did you do with the deed, Mr. Conklin, after you took the acknowledgment? A. I do not remember; it was either put in the safe or turned over to my father; I do not remember.

A. Did you see Mr. Bron there that afternoon? A. He was in that afternoon.

Q. January 3d? A. January 3d.

Q. Do you know whether or not he took the deed with him? A. I couldn't state positively. He was to have brought his wife in that afternoon to sign up, and he was in himself, and I remember from that.

151 Q. And he brought his wife in the next morning? A. He brought his wife in the next morning.

Q. And whether or not he took the deed out that afternoon you do not know? A. I couldn't say positively.

Q. Now with reference to the improvements and the work donw up there during the holidays, was that your home, Mr. Conklin? A. Yes sir.

Q. Had you lived there prior to December 22d? A. I had lived there—I was away from November 23d to December 22d; arrived at home on December 22d.

Q. So when you went away from home, you didn't know anything about the transactions, that was anything pending? A. No.

Q. How many trees were removed from that space where the cellar was dug? A. I couldn't state; don't know.

Q. Well, can you approximate it? A. I could simply guess it, probably four or five trees; that's just a guess, however.

Q. Well, fruit trees? A. Fruit trees, I believe, with the exception of one elm, or something like that.

Q. Who cut that elm down, or do you know? A. I don't know.

Q. Do you know of the fence having been removed during that period? A. No sir.

Q. Do you know that it was not? A. I believe I would say yes, that it was not.

Q. Do you know what became of the fence? A. That was done after I moved away from there, and I couldn't state except that I seen part of it rolled up in the back yard
152 afterwards along in the summer. Part of it was rolled up—part of the wire was still back in the back yard.

Q. In the summer? A. Yes, or in the warm weather afterwards.

Q. Don't you know Mr. Underwood got the fence? A. He didn't get all of it because I remember distinctly of seeing the roll of wire back there.

Q. You don't know when the excavation began? A. No sir.

RE-DIRECT EXAMINATION, by Mr. Holmes.

Q. You know that whether or not the deed was in Mr. Bron's hands on the 31st, you do know that the deal was closed on the 4th?

By Mr. Brubacher: We object to that, Your Honor, as calling for conclusion of the witness, leading and suggestive.

By the Court: Sustained.

Q. Do you know when the deal was closed?

By Mr. Brubacher: We object as calling for conclusion and not proper rebuttal.

By the Court: Overruled.

Q. When?

By Mr. Brubacher: We object as calling for conclusion, incompetent, irrelevant, and immaterial, not proper rebuttal at this stage of the proceedings, according to the rule heretofore made by the court.

A. The deal was actually closed the next morning, when Mr. Sargent got the deed at the office.

By the Court: It will be stricken out; he has answered it before.

153 DIRECT EXAMINATION OF MRS. CONKLIN, by Mr. Holmes.

Q. What is your name? A. Mary Conklin.

Q. Where were you living in the months of December, 1910, and January 1911? A. 901 Waco Avenue.

Q. Were you living in the property that is immediately south of what is known as the North Waco flats now? A. Yes sir.

Q. How far from that? A. About 10 feet or 12, something like that.

Q. Do you know how many feet of property you had on Waco at that time.? A. 161, I think.

Q. 161? A. I think so.

Q. Do you know how close the kitchen was to this property to the foundation of the Waco flats? A. It was about 10 or 12 feet.

Q. The same distance? A. Yes, it was on the line.

Q. Do you know, Mrs. Conklin, whether there was any work done there on the 3d day of January, 1911, on the foundation? A. Yes.

Q. Was there? A. There was not.

Q. Is there any screen on that window so that you couldn't see out there? A. Nothing but a window shade.

Q. Do you recall any special circumstance that makes you remember about the January 3d? A. Well, I remember that I had a very hard cold, that I was about the house.

Q. Do you know how it was occasioned. A. The water
154 froze in the kitchen, and the pipe burst, and went over the floor, and I was trying to stop that, and caught cold in the early morning.

Q. What time was that with respect to the Bitting fire? A. I caught my cold the evening of the Bitting fire, that was on Monday, wasn't it; then I had my heavy cold, but I was around the house.

Q. Did you go out of the house on the 3d or 4th? A. No, I did not.

Q. Was there anything done in the way of work upon the foundation there on the 4th? A. 4th of January? There was not.

Q. Do you know whether or not there was prior to the 1st day of January any trees cut off of this ground that afterwards became the foundation of the Waco flats? A. Do you ask if I know?

Q. Yes. A. I do know that they were not cut.

Q. Have you any circumstance that will refresh your memory upon that point? Answer yes or no. A. Yes I know.

Q. Just state what that is? A. Well, the kitchen window is very long, it reached the ceiling, and is very wide, and I have a shrubbery bed out beyond that, just right out next the kitchen window, and I was lamenting that I had not before the freeze moved some mint and some shrubbery from that place.

Q. At what time was that? A. Well, that was during the week some time; I do not remember when it was.

Q. Was it prior to the Bitting fire or after? A. It

155 was after the Bitting fire, because we had sold the property and I said it was so hard that I was sorry I hadn't dug them up.

Q. Were they afterwards dug up. A. No.

Q. Or were they removed by anybody? A. They put the foundation over them.

Q. Did they remove them at the time of the excavation? A. Some of the shrubbery was piled along with the trees; they plowed the trees out.

Q. Do you remember when Mr. Ginzel your son-in-law received his tree or trees? A. I do not know the date, but it was after they were turned over.

Q. What date was that in respect to that cold spell on the 2d or 3d of January? A. Well that was as soon as the ground was thawed enough for the men to go to work.

Q. How many days? A. I couldn't say, but I think it was after the 8th.

Q. Do you recall the fact of a tree being dug up? A. What tree?

A. The trees that Mr. Ginzel took away with him. A. Well, they were taken up and—

Q. Do you recall that fact? A. Yes.

Q. Was the ground frozen at that time? A. I do not remember.

Q. Was that now after or before you signed that deed? A. Well, the time he took the trees, he took one little elm that stood in the strawberry bed, in the winter some time, that I gave him, and that was the only tree that was dug up until
156 the plowing was done to turn the things over; that was an elm.

Q. It was the 2d or 3d, after you signed the deed, or before? A. The only tree was taken in the winter some time, I do not know when, but the other trees and the dewberry bushes and the raspberries were taken when the men were plowing.

Q. Was that after or before the execution of that deed? A. After.

Q. How much after? A. Well, I do not know.

Q. Was it more than one day or less than one day: state approximately how much time it was. A. Well, you know I don't; I couldn't state that the trees were—that they were taken before the 8th as I remember they were taken after the 8th, and his trees were taken down the same time they were all taken.

Q. Was that after the 4th?

By Mr. Brubacher: We object to that, the 8th is after the 4th.

By the Court: Sustained.

CROSS EXAMINATION, by Mr. Brubacher.

Q. Mrs. Conklin, you were not out of the house on the 3d

or 4th, were you? A. I wasn't out of the house, but I was over the house.

Q. You were not confined to your bed? A. I was not confined to my bed, but I was too ill to go down town.

Q. Was that the reason you didn't go down town and acknowledge the deed on the 3d? A. That was.

Q. That flat is on the north of the house, isn't it? A. It is.

Q. Does any ice ever accumulate on your windows when the temperature is down around zero? A. Not but what
157 I could make a place if I wanted to see out.

Q. But frost accumulates on your windows does it not, just the same as on others? A. Yes.

Q. And at that time there was frost upon the windows, possibly heavy frost, is not that true? A. I believe it is.

Q. On the north side of the house, isn't that correct. A.

.....

Q. And men might have been out there and you not been able to have seen them? A. No. Mr. Brubacher, I could have seen them.

Q. Could you see them through the frost? A. No, Mr. Brubacher, I never have my windows frosted. We have a good furnace.

Q. Then I understand there is not froxt accumulates on the windows so that you couldn't see out. A. No, you can always see out—there is some frost.

Q. But when it got down close to zero, still on the north side no frost ever got on the windows so that you couldn't see out? A. I always could see out of my windows. Of course there was some frost, but the house was warm.

Q. You said your judgment is that there was no trees removed till after the 8th, that Sunday? A. Sometime after the 8th. They might have commenced Monday, I don't know. I remember the time they came but I don't remember the date.

Q. You don't remember what day it was they came A. I don't remember the date.

Q. Do you remember making any complaint about the trees being piled under your window there? A. They never
158 piled any under the window. They didn't come to the window, they dragged them back.

Q. Under the dining room window? A. They didn't reach the window; you see the line of trees escaped the window, and they dragged the trees back; they took a chain and they dragged the trees back.

Q. The trees covered the property? A. And in front there's a large elm.

Q. There was trees covering the property where it was necessary to remove trees in order to excavate the cellar? A. Will, they didn't come to the window.

Q. You understand, Mrs. Conklin, that there was a space about 36 by 38 that they excavated for the cellar? A. Yes.

Q. Now there were trees on that space were there not? A. There was one tree in front, the large elm that still stands there. Right west of the window there was another tree. Then this land northwest (?), a strip of it, and it was a new orchard we put out and there were trees there. It didn't come up to the window only the shrubbery.

Q. I don't believe you understand me, Mrs. Conklin; there was a space there of about 36 by 38, where they excavated for the cellar. Now there were some trees on that space, and there were trees on the other part of the lot? A. Well, you see that was back of the house you see it wasn't in front of the house; there was blackberries (?) in front of the house, north, there was one large tree, and this new orchard was a little north, and my shrubbery bed was out in front of the corner of the house; but it didn't bring the trees in the kitchen window.

Q. Do you remember seeing Mr. Underwood working at
159 that flat? A. Yes.

Q. Do you remember his getting any fencing or shrubbery that was there? A. No, I remember—

Q. Do you remember telling him he could take the fence posts and the wire? A. I do not.

Q. And would you say that he wasn't there and took away the fence poses and the wire during the holidays? A. I don't know anything about Mr. Bron's fence; there was some fence of ours and fence of Mr. Bron's; I don't know about them.

Q. Now was there a fence on Mr. Bron's premises it was necessary to remove in order to put up the building? A. No, there was no fence there; there was a little fence near his west line.

Q. Whatever fence there was had to be removed? A. It did.

Q. Do you remember talking with Mr. Underwood with reference to moving the fence? A. No.

Q. And in reference to getting some shrubbery there? A. No.

Q. That may have happened as early as during the holidays?

By Mr. Holmes: We object, incompetent, irrelevant, and immaterial.

By the Court: She may answer.

Q. I say, if it had, it may have happened during the holidays? A. It didn't, because he didn't have anything to do with that during the holidays.

Q. You say that he didn't have anything to do with it during the holidays? A. He didn't.

160 Q. Who do you refer to? A. Why the man you are speaking of.

Q. Mr. Underwood? A. Yes.

Q. How do you know he didn't have a contract with Mr Underwood to remove this stuff?

By Mr. Holmes: We object as incompetent and not a fair question.

By the Court: I don't believe myself it is cross-examination.

Q. Mrs. Conklin, wasn't there a pile of logs piled up in front of your dining room window during the holidays?

By Mr. Holmes: We object as not proper cross examination.

By the Court: She may answer.

A. There was not.

Q. Do you remember asking Mr. Bron to remove a pile of logs in front of your dining room window?

By Mr. Holmes: We object as not specifying any time. And not cross examination.

Q. At any time?

By the Court: I do not believe that is cross examination, Mr. Brubacher.

DIRECT EXAMINATION OF STANLEY CONKLIN, by Mr. Holmes.

Q. What is your name? A. Stanley Conklin.

Q. You are a son of P. J. Conklin? A. Yes sir.

Q. Where is your home? A. 901 Waco—at the present time?

Q. I mean in December, 1910 and January, 1911. A.
161 901 Waco.

Q. You were living with your father and mother at that time? A. Yes sir.

Q. You were going to school, were you at that time? During that year? A. Yes sir.

Q. Was there or was there not a holiday during what we call Christmas week, and also New Year's week. A. There was a holiday two weeks.

Q. Were you around home most of that time? A. Well, the most of the mornings I was, and late (?) afternoons.

Q. Do you recall the Bitting fire? A. Yes sir.

Q. Will you state whether prior to that time there had been any trees cut off of what has since become—the ground of which has since become a part of the Waco flats in controversy in this case? A. There was not.

Q. Do you know whether there was any work done, there, answer yes or no, on the 3d or 4th of January, 1911? A. Yes I know.

Q. Do you know whether there was any work done, there, on the 3d or 4th of January, 1911? A. There was not.

CROSS EXAMINATION, by Mr. Brubacher.

Q. Was you there, Mr. Conklin, at 8 o'clock on the morning of January 3d? A. Yes sir.

Q. How do you know you were? A. Well, because I was having a holiday and I never had anything to take me away.

Q. How do you know you were at home at that time? A. Well, I am just positive that's all.

162 Q. You know you are sitting in the chair there now, but how do you know you was at a particular place at 8 o'clock January 3, 1911? A. I generally ate breakfast about then.

Q. Do you remember eating breakfast that morning? A. Yes sir.

Q. What did you have? A. Well, guess you got me going on that.

Q. The facts are, Stanley, you don't have any distinct recollection of being anywhere on January 3d, 1911? A. Well, I am just positive I was at home.

Q. That was your custom to be at home? A. Yes sir.

Q. And aside from that you don't have any recollection? A. No.

Q. Do you know where you were on the night of December 31, 1910? A. Yes sir. I know I was home.

Q. Did you attend a party that night? A. No sir.

Q. So there—What time did you get home on the last day of December, 1910? A. I don't know.

Q. Aside from what was your custom of being home, you have no recollection of anything having taken place upon these premises, have you, during the 3d, or 4th days of January? A. I don't understand that.

Q. I will withdraw that. There was some flats started on the premises south of you, were there not? A. At what time?

Q. I was asking you if there was some flats started on the premises south of you? A. Yes sir.

163 Q. When were they started? A. Well to the best of my knowledge they were started—Well, I do not know, I have to go from a certain time—from the fire, just approximately.

Q. I am talking about the flats south of your house. A. I don't know.

Q. You can't tell the month. A. No.

Q. Have no notion? A. No.

Q. You are stating from the Bitting fire? A. Yes sir.

Q. Were you on the north side of the house, of your house, on either the 3d or the 4th of January? A. Well, all I can say I was all around the yard.

Q. Have you a distinct recollection of being on the north

side of your house on the 4th day of January? A. No sir, I don't believe I have.

Q. What way do you usually go or come from your house? Down town? A. I go north to the street-car line; Waco Avenue.

Q. When was the first time you remember seeing these men up there at work? A. You mean on the first of the flats?

Q. On the premises, the Waco Street flats? A. Well on the one south, I don't know; it was quite a while.

Q. I am talking about the ones on the north. A. Well it was—I don't know, that was after I started to school again.

Q. You didn't see them work there during that holiday week? A. Not that I remember.

164 DIRECT EXAMINATION OF E. D. KIMBALL, by Mr. Harris.

Q. Mr. Kimball, do you remember when you had that deed in controversy in your office prior to the time of this deed's being paced on record?

By the court: What deed do you refer to?

Q. Deed from Laura Conklin and husband to Charles Bron to the property known as the Waco flat property. A. I am not sure that I ever had it in my office. I think Sargent may have taken it direct from Conklin's office to the court house, but I am not sure.

Q. Did you send Mr. Sargent down to Conklin's to get that deed? A. I did.

Q. When did you send him? A. On the 4th day of January, 1911.

Q. Do you remember what time of day it was? A. In the forenoon.

Q. Now, Mr. Kimball, have you a memorandum of when you transferred the $1000 note subsequent to the transfer of the $6500 note on what is known as the New Hampshire Savings Bank mortgage? A. Yes sir.

Q. When was that note sent to the New Hampshire Savings Bank?

By Mr. Brubacher: We object as incompetent, irrelevant and immaterial, not in any manner binding upon the mechanics lien holders.

By the court: Overruled.

A. On the 16th day of March, 1911, I sent it to them.

Q. When did they remit for that? A. On the 20th day of March, 1911.

Q. Was that note here in the room the other day when you were testifying, with the other notes? A. It was here.

Q. Is that note endorsed by you the same as the others?

165 A. It was.

Q. Now then, when was the $6500 note sent to the New Hampshire Savings Bank?

By Mr. Brubacher: To which the mechanics lien claimants object as incompetent, irrelevant, and immaterial, not binding to them.

By the court: Overruled.

By Mr. Brubacher: Exceptions.

(Witness reads from paper.)

A. The 9th of March, 1911.

Q. When was it remitted for? A. I haven't that data here.

Q. About equalized it? A. It's my recollection that they authorized the application of the proceeds of a $6500 mortgage which had been secured by property in the fourth block on North Emporia to this loan, and they sent me those papers on the 13th day of March, 1911.

Q. Did you then charge that up to them? A. I did. I credited this Bron loan the $6500 on the 9th day of March, and they sent out the papers on the 13th.

Q. Now when you sent the notes, $6500 worth of notes, and the mortgage back to them, was that the date of the assignment by you of the mortgage on the back of it? A. Yes, about that time, when I sent them the mortgage, I assigned it on the back.

Q. Were all of the notes endorsed at that time, that is the $6500? A. They were.

Q. Now Mr. Kimball, Mr. Brubacher interrogated Mr. Charles Bron relative to some unsecured loans; I will ask you if you had made Mr. Bron unsecured loans in the months of January, February, March and April, 1911? Answer yes or no.

166 A. Yes.

Q. Will you give me the amounts that you paid him during this period?

By Mr. Brubacher: We object as incompetent, irrelevant and immaterial, except in so far as it enters into this transaction.

By the court: Sustained to that extent.

Q. Mr. Kimball, there was a $750 check was mentioned here yesterday. A. Yes sir.

Q. Do you know when Mr. Bron got that $750? A. On the 31st day of January, 1911.

Q. Do you remember what time of day? A. I cannot state the precise hour, but it was quite a long time before the close of the bank at the very least.

Q. Would you say it was before noon or afternoon? A. I should say it was in the forenoon.

Q. At the time of the giving of that check did that have anything to do with the Waco property? A. When I first drew

the check—

Q. Answer that qestion yes or no. A. When I first drew it—

Q. At the time the check was drawn, did it have anything to do with the Waco property? A. I think not.

Q. Now if you say that is true, why do you say that? A. Because on the stub book—

By Mr. Brubacher: We object to what the stub book shows, not the best evidence.

Q. Have you the stub book with you? A. I have.

Q. Let me see it. A. I guess Mr. Brubacher's seen it before.

167 Q. Now Mr. Kimball, you may now explain that entry on the stub book. A. When the check was first drawn, it was marked to be charged to the emporia Avenue account.

Q. When was it changed then from the Emporia Avenue account to the Waco account? A. That I do not remember.

Q. When was it charged up on the journal or ledger? A. On the journal on the 4th day of January.

Q. What did it show on the journal or ledger at that time?

By Mr. Brubacher: We object as not the best evidence.

By the court: Sustained.

By Mr. Harris: I am asking about the ledger. The ledger shows that account on the 4th.

By Mr. Brubacher: I admit that.

Q. It is charged up on the 4th on the ledger? A. It is.

Q. Now Mr. Kimball, what advancements did you make to Bron on this Waco account, the days and the amounts? A. $6750.

By Mr. Brubacher: We object to that as not responsive to the question.

Q. Give the whole account now, just as it is down. (Witness reads.) A. January 4, recording 2 and a half and $1.10; on January 4th, check which was left here yesterday, $750; January 17, check $500 and another $500, same date; January 21, check, $1000; January 25, check $500; January 28, balance, overdraft.

168 By Mr. Brubacher: We object to that as not responsive to the question. The question is what payments did he make on the Waco job.

By the court: Objection overruled.

A. Balance, overdraft; loan $10.54; $170, 25c on January 28th; February 17, check $500; same date, another check, $500; March 9, commission for the exchange of that proceeds, $50;

March 27, check, $1500; April 19, part of note, 1108, which is in the records of this court, $800; August 4, check, $55, 31c; August 9, Check, $500; August 21, check, $100; February 20, 1911, balance of general account, $120.84.

Q. Now, Mr. Kimball, during the month of March, 1911, did you pay Mr. Bron any other moneys on any other account? A. I did.

By Mr. Brubacher: Hold on.

Q. Unsecured loans?

By Mr. Brubacher: Hold on.

A. I did also in June, 1911.

By Mr. Brubacher: We object as incompetent, irrelevant and immaterial.

By the court: I think the objection is well taken.

By Mr. Harris: Counsel for the New Hampshire Savings Bank offers to show that in the month of January, February, March, and April, 1911, that E. D. Kimball from whom they purchased the $7500 mortgage paid and advanced to Charles Bron a sum in excess of $8000, which was paid to Bron on unsecured account and on loans made to Bron without any security whatsoever, and in the month of June, 1911, $2000, the $2000 in the month of June, 1911, to be used on this building.

By Mr. Brubacher: The mechanics lien claimants object to the offer unless it is accompanied by a specific proposition
169 to show that the funds thus furnished were available for this work and were not furnished on other contracts.

By the court: The offer to prove will be rejected, except as to the $2000 or any other sum that went into the property now investigated. The objection will be sustained as to other accounts except what went into the property now under consideration.

Q. Did you advance him $2000 in the month of June? A. On the 29th day of May, 1911, I advanced him $2000 on his unsecured note numbered 1151.

Q. What was that money advanced for? A. For his use in building.

Q. Where? A. I was thinking it was on this building, but it might have been on Market Street.

Q. Do you know whether it was for this flat or other property? A. I shall have to refresh my recollection by further consultation of my book. I noted that hastily as I was coming from the office.

By Mr. Brubacher: What is the number of that loan on which that was advanced, you read it off there. A. Yes Note No. 1151.

By Mr. Brubacher: This loan is 1151? A. Yes.

By Mr. Brubacher: So it couldn't have been on this loan at all?

Q. What is your best recollection as to what this $2000 was advanced for? A. I let him have $2000 and $4000.
170 The $4000 was secured by second mortgage on this property—The $2000 as I now believe was on Market Street.

By Mr. Brubacher: I move to strike out the $4000 answer as not responsive.

By the court: Sustained.

Q. What was the $4000 advanced on? A. Waco Avenue.
Q. When was it advanced. A. I need to consult my records to answer positively.
Q. About when was it advanced? A. In the summer of 1911.
Q. Is that evidenced by any note that is here in bankruptcy in proof? A. No.
Q. Sir? A. I think it is.
Q. When did you pay him $4000? A. I am unable to state at this time.
Q. About when? A. In the summer of 1911.
Q. What date would you say it was prior to? A. It is my recollection that it was in June.

By the court: Was that $4000 any part of these loans that have been proved by other parties? How would it be a $4000 mortgage to him?

By Mr. Harris: If it is a $4000 mortgage, it is proved up in his name. That is the only $4000 mortgage that is in this proof.
A. Your Honor, may I make a correction: This $2260 that I advanced on this Waco property.
Q. What day was that? A. June 25, 1911.

171 By the court: Unsecured?

By Mr. Harris: $4000 secured.

A. Let me withdraw that. The $4000 I gave was on Market too. I have a memorandum here with relation to the Waco, and the records of this court will show the $4000.

By Mr. Brubacher: We move everything to be stricken out with reference to the $4000 mortgage, for the reason that it is indefinite and uncertain as to what property it is on.

Q. You made him a loan June, 1911, for $2260? A. I did on the 5th day.
Q. How was that secured? A. Unsecured.

Q. What was that money advanced for? A. It was advanced for his use on the Waco Avenue flat.
Q. Sir? A. It was advanced to be used by him on the Waco Avenue flat.

By Mr. Brubacher: We move to strike that out.

Q. Have you got any statement in writing from Charles Bron as to his financial condition and wealth? A. I have.
Q. Will you produce it? A. It is here.

By Mr. Harris: On behalf of the New Hampshire Savings Bank and other claimants, we offer in evidence part of Exhibit G, being statement made to Charles Bron in writing on June 6, 1911, as to his financial condition and financial worth.

By Mr. Brubacher: To which the mechanics lien claimants object as incompetent, irrelevant, and immaterial, has no bearing whatever on this question of priority.

172 By the court: What is the date of it?

By Mr. Harris: June 6, 1911.

By the court: I will receive it. I don't see much relevancy one way or the other.

Q. Mr. Kimball, did you have any conversation with Mr. Charles Bron relating to the commencement of the work on the Waco flat? A. I did.
Q. When did you have the conversation? A. At various times.
Q. When was the first time? A. The first time that I now definitely remember was after they began to file mechanics liens last winter.
Q. What was said by him to you in that conversation as to the date of the commencement of the building?

By Mr. Brubacher: We object as incompetent, irrelevant and immaterial, no sufficient foundation having been laid for impeachment.

By the court: I do not remember any.

By Mr. Harris: Then I ask the court for permission to interrogate Mr. Bron on that proposition.

By Mr. Brubacher: We object to opening up the case.

Q. What was stated by Mr. Bron to you in that conversation as to the date of the commencement of the building on Waco Avenue?

By Mr. Brubacher: We object to that as incompetent, irrelevant and immaterial, hearsay, and no proper foundation having been laid for impeachment.

By the court: I am afraid that's true. I will sustain it.

173 By Mr. Harris: We ask the court for leave to examine Mr. Bron on that proposition.

By Mr. Brubacher: We object for the reason that we have closed our case.

By the court: You may examine him.

Thereupon this witness was temporarily excused.

DIRECT EXAMINATION OF CHARLES BRON, by Mr. Harris.

Q. Mr. Bron, did you have any conversation with Mr. E. D. Kimball in his office after some of these mechanics liens were filed relative to the date of the commencement of the work on the Market Street building and the Waco building? A. Well, I believe I had.

Q. Did you not in that conversation state to Mr. Kimball that the work was commenced on the Market Street property before the mortgages were made? The Market Street property? A. I told him that they were started before on the Market Street.

Q. And did you not say to him that there was no work commenced on the Waco property until after Mr. Kimball's mortgage and Mr. Conklin's were placed on record? A. I think there was a talk about that, but I never said that it was done.

Q. Did you not make a statement to him that no work was commenced on the Waco property until after Mr. Kimball's and Mr. Conklin's mortgages were filed for record?

CROSS EXAMINATION, by Mr. Brubacher.

Q. Mr. Bron, you don't remember what your conversation was with Mr. Kimball with reference to the Waco Street property, specifically, do you? A. There was some other things, I cannot remember all of it.

174 Q. I will ask you if you found—After that conversation with Mr. Kimball, did you find any memorandum relating to the Waco Street job? A. Yes.

Q. I will ask you, Mr. Bron, if you have a distinct recollection when the work was begun on the Waco Street job at the time of your conversation alluded to by Mr. Harris? A. I wasn't sure when Mr. Kimball came to me and wanted to know the number of days it was started. I figured it back when I had to start the job; Kimball promised me some money and I had to get this started and get the deed up in his office.

Q. When did you figure it back? A. Lately.

Q. How did you figure it back? A. Well, I had to study up things to find it out, and I found the slip under your hand.

Q. Did you have this slip at the time of your conversation with Mr. Kimball with reference to the Waco Street property? A. No, I don't think I had.

Q. And at the time you had your conversation with Mr. Kimball your recollection wasn't clear? A. No.

Q. Now, I will hand you, Mr. Bron, the paper marked Exhibit K, and state where you got it. Who made it out? A. Kimball. It was sent to me by mail.

Q. By Mr. Kimball? A. Yes sir.

Q. Did you know you had that slip before or after your conversation with Mr. Kimball? A. No, I don't think I know; it was found with the papers at home.

175 Q. Who found it? A. Charley.

Q. Then did you have it when you had your conversation with reference to when the work was begun? A. Yes sir.

Q. And do you remember whether you got your first money on January 3d? A. Yes sir.

Q. The slip shows January 4th, I believe, does it not? A. Yes sir.

Q. And you got your first money on January 3d? A. I got a check January 3d.

Q. And you remember, do you not—

By Mr. Harris: We object, not proper direct examination.

By Mr. Brubacher: You Honor, I understand he is recalled as his own witness.

By the court: He is permitted to recall him for cross examination.

A. About when did you find this slip? A. About 10 days ago.

By Mr. Brubacher: We offer in evidence as a part of the examination of this witness the slip marked Exhibit K.

By the court: No objections?

By Mr. Harris: No.

By the court: It will be received.

DIRECT EXAMINATION OF E. D. KIMBALL, continued, by Mr. Harris.

Q. You may state now about when you had your conversation with Mr. Bron relative to the commencement of the work on the Market Street and the Waco Building. A. Once that I recollect particularly was after the liens were filed on the property.

176 Q. Where was the conversation? A. Here in Wichita, I think in my office.

Q. What did Mr. Bron say to you at that time as to the commencement of work on the Market Street and the Waco building?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial, proper foundation has not been laid. The di-

rection of Bron has not been called to any specific talk with this witness with reference to the commencement.

By the court: Overruled.

By Mr. Brubacher: Exception.

A. He said that the mortgages were given some time before the work began and was very emphatic in saying that the mortgage was all right.

Q. What property was that? A. The Waco.

Q. What did he say about the Waco? A. He said on the Market that he was afraid that the other parties were ahead.

Q. How many times did you and he talk about that? A. We talked about it. I think it is last winter, and again some time more recently.—again within a month or six weeks.

Q. What did he state then?

By Mr. Brubacher: We object to that, that no foundation has been laid for this particular conversation in the way of impeachment.

By the court sustained.

CROSS EXAMINATION, by Mr. Brubacher.

Q. I hand you paper marked Exhibit K, Mr. Kimball. Was that made out by you?

177 By Mr. Harris: We object to that as improper cross examination.

By the court: It is not proper cross examination.

Q. Mr. Kimball, you testified that in the month of June, 1911, you advanced to Mr. Bron $2260 to be used on the Waco Street flats. A. I did.

Q. Did he ever pay that money back to you? A. Yes, I think he did if my recollection is correct.

Q. When did he pay it back? A. I should have to refer to my book and see.

Q. Didn't he pay you $2000 of it back before you gave him the check? I call your attention to check numbered 820. A. Not that.

Q. You say he didn't pay any money aggregating $2000 in the month of May, 1911? A. Not on a note that I took from him in June.

Q. I am asking if he paid you any money in the month of May, 1911, amounting to $2000?

By Mr. Harris: We object as incompetent, irrelevant, and immaterial, not proper cross examination.

By the court: Sustained.

Q. Did you take a note on the 26th day of June, for $2260,

or in any other month than June? A. On the 5th day of June, 1911.

Q. What was that? A. A note numbered 1159, unsecured.

Q. That was a note, but did you give him a check of that date? I am talking about this check of $2260 you spoke about. A. It is my impression that I gave him a check.

Q. I am asking you if you gave him a check on June 5,
178 1911? A. To be sure of the date I should have to look it up.

Q. You don't know whether you did or did not? A. Not without looking it up.

Q. In the month of May, 1911, Bron gave you a check for $2000, didn't he?

By Mr. Harris: We object, incompetent, irrelevant, and immaterial, improper cross examination.

By the court: Answer that question.

A. Yes.

Q. May 8, 1911? A. Yes.

Q. What was that check for?

By Mr. Harris: We object as incompetent, irrelevant, and immaterial, improper cross examination, has no relation to any matter concerning which the witness has been examined.

By the court: Sustained.

Q. Did that have any bearing, Mr. Kimball, on the $2260 transaction? A. None that I can remember.

Q. But you do know that the $2600 claim has been paid you? A. I think it was merged in another note later.

Q. You took security on some other transaction, on some other farm, did you?

By Mr. Harris: We object as improper cross examination.

By the court: I think it is immaterial, whether it has been paid or not.

Q. Do you remember of giving him the cash or check for that $2260? A. I have a memorandum that I have advanced. I suppose I gave him the money or check.

179 Q. You don't know whether you gave him either? A. I can't tell without looking at my books further.

Q. All you know about it is that you have got a memorandum that states that you paid him $2600? A. That is all that I consulted.

Q. And you are satisfied that if you did it has been paid back? A. I said it was merged in another note.

Q. Didn't you state that it has been paid? A. I may have taken another note for it.

Q. I call your attention here, June 4th, to a memorandum,

Bron 1159, demand note charged up (?) 1159, $2260? A. That is right, that is just as I thought it was.

Q. What is this 1159? A. It is a note number.

Q. What is this 3839? A. It is a check number.

Q. What does that show there as having been advanced on, what job? A. It doesn't show. That isn't paid, this thing.

Q. Same amount, and same date? A. I mean the statement here rendered that you hold in your hand didn't have relation to the Waco flat except as the items involved(?).

Q. You have made an item against Mr. Bron and you have included as of June 5, 1911, a charge of $2260 without reference to any Waco Street flat? A. The note was due and I charged it up to him.

Q. Hadn't that reference to a Clearwater farm? A. That note was paid by giving me a loan secured on the Clearwater farm.

Q. It was on June 4, 1911, and your check was on June 5,
180 1911? A. My check was on June 5, 1911.

Q. You made him a loan of $4000 on the Clearwater farm, didn't you? A. I did.

Q. And going to make up that loan on the Clearwater farm was a check of $2260 that you had given him on June 5th? A. Yes, he told me he wanted some money for the Waco.

By Mr. Brubacher: I move to strike that out.

By the court: I will sustain that.

Q. Now, all you know, then, whether or not that $2260 went into any other flats, is what Bron told you he wanted the money for? A. And the memorandum I made at the time.

Q. The memorandum don't show he wanted it to go into the Waco flat? A. The memorandum does show it went into the Waco flat.

Q. Read it. A. I am not talking about that; I am talking about another memorandum.

Q. I am asking about the money you furnished. A. The other memorandum is in relation to this property—this is about the Clearwater farm. I didn't specify in that statement what he told me he wanted for this and that with the money that he got. He told me when he got the $2260 that he wanted it to use on the Waco Street flat.

Q. You don't know whether it was used any other than what he told you that he used the money for? A. What he told me is all I know.

Q. You made numerous other loans to him through January, February, and March, did you not? A. I think I did at different times.

181 Q. How many thousand dollars. A. I can't tell without searching it up.

Q. $50,000? A. I suppose so.

Q. A hundred thousand? A. No, I think not.

Q. $75,000? A. I don't know.
Q. All told, how many loans have you made for him?

By Mr. Harris: We object as improper cross examination.

By the court: I think so.

November 21, 1912.

Q. You were asked by Mr. Harris when you sent to the New Hampshire Savings Bank the $1000 note covered by that $7500 mortgage. I believe you stated it was on the 16th day of March, 1911? A. You want to know when I sent the $1000 note?

Q. Yes. A. On the 16th day of March, 1911.

Q. And the $6500 note on the 9th day of March? A. It had been sent previously, to that time, I believe.

Q. Both notes, then, were sent after the bankruptcy proceedings were instituted? A. 1911. About a year prior to the bankruptcy proceedings, I think.

Q. Now, you were asked a few days ago when you were on the witness stand, what items went to make up—I will withdraw that. You were asked a few days ago on the witness stand, in what way you paid the $120.84, I believe, that appears as going to make up the $7500 loan.

By Mr. Harris: We object as improper cross examination.

By the court: I think it is improper.

182 Q. I believe you stated on your examination by Mr. Harris that you didn't remember having seen the deed in your office on January 3d? A. That's true.

Q. Do you swear that it wasn't in your office on January 3d? A. Yes.

Q. You are positive now that Bron didn't bring it to your office on January 3d? You did testify when you were on the witness stand before that you weren't certain about that, did you not? A. I presume I did so, but as I reflect on the matter and consult my books and see how the thing was done, I—

Q. What is there in your books to show that that deed wasn't in your office? A. There was the payment for recording that deed.

Q. How does that indicate it wasn't in your office? A. I recorded it, right away.

Q. How do you know? Do you always record it as soon as you get an instrument? A. I did at that time.

Q. I call your attention to a deed you made to Mr. Bron on the Market Street property, dated January 3, 1911. Did you record that deed as soon as you got it?

By Mr. Harris: We object, not proper cross examination, incompetent, irrelevant, and immaterial.

By the court: Sustained.

Q. Now is there anything else in your books that would indicate that that deed wasn't in your office on January 3d? A. No sir. I don't know as there is.

Q. You had the abstract to this property, did you not, before the loan—before the papers were drawn up on the loan?

183 By Mr. Harris: We object as incompetent, irrelevant, and immaterial, not proper cross examination.

By the court: You may answer that.

A. I had the abstract, yes. And your opinion on the title.

Q. Didn't you want to see the deed before you drew up your papers, to know whether or not Bron had any title to the property? A. No.

By Mr. Harris: We object as improper cross examination, incompetent, irrelevant and immaterial.

By the court: Sustained.

Q. The abstract don't show he had any title to the property?

By Mr. Harris: Same objection.

By the court: Sustained.

Q. Were you making up a mortgage on the property for Bron to sign without knowing whether he had any deed? A. Yes.

By Mr. Harris: Same objection.

By the court: Sustained.

Q. But you were very specific the other day, Mr. Kimball, that you didn't remember about the details and you wouldn't swear that that deed was not in your office on January 3d? Isn't that a fact?

By Mr. Harris: Same objection.

By the court: Overruled.

A. Some days ago, I didn't remember the thing as well as I did after hearing the details brought to my memory—refreshed my memory.

By Mr. Brubacher: Now I ask leave to make this witness my own in reference to that $120 item.

By the court: Proceed.

DIRECT EXAMINATION OF E. D. KIMBALL, by Mr. Brubacher.

Q. You may now state, Mr. Kimball, explain more fully the $120 item that appears on your ledger account as
184 going in to make up the $7500 loan? A. That was credited to Mr. Bron's general account.

Q. When did you pay that loan to Bron? A. It was paid to him various dates, beginning perhaps nearly a year previous.

Q. How's that? A. Money had been paid out on his general account at dates a good deal prior to that time.

Q. You were to give us items of what they were, when they were paid. A. In the multiplicity of things I was to get, I had forgotten that.

Q. That was the only thing, Mr. Kimball, we wanted you to get. A. You asked me to look up what Mr. Bron's $2000 paid for, that was one thing.

Q. I asked you about the $120 item that was to make up the $7500 loan, and you were dismissed with the statement that you were to get it. A. Not last night.

Q. No, when you went on the stand as our witness. A. I had the ledger in court just a day or two ago.

Q. We asked you about that and you said you didn't have it.

By the court: Produce your data and ascertain what amounts went into that amount charged up on the Waco Avenue account.

By Mr. Brubacher: Here's another matter I would like to ask him about.

By the court: Proceed.

Q. I hand you again Exhibit K, Mr. Kimball, that was introduced yesterday. These were the items were they not that practically went up to make up the $7500 loan? A. A portion of them.

185 Q. A portion of them? A. Yes sir.

Q. Well, you have $7500 charged there, have you not? A. No, it is a balance carried forward.

Q. You have charged Bron $7500 on the times on that slip? A. No.

Q. What have you done? A. I haven't charged him $7500 on the items on that slip.

Q. Well, with the $776 which you designate as a balance due Bron, that goes to make up the $7500? A. It goes to make up the $7500 except the $776.15, which was still carried forward to his credit.

Q. Now in lieu of that $776.15, didn't you state that you had given him credit or paid him items as noted there on the margin—figure this up.

By Mr. Brubacher: I think perhaps we can expedite matters by having Mr. Kimball identify this as the correct amount, this slip, which went to make up the $7500 note. In giving the

list of items yesterday which went to make up that $7500 loan, he quoted the item $776.15, but he gave that in different sums as having been paid at different times, and in doing that inadvertently he stated that he had paid $100 more than what is shown by the statement.

A. That is a preliminary statement made before, to show Bron how the account stood.

Q. It had all been paid when you gave this slip to Bron, except that $776 item? A. I so figured it at that time.

Q. Now in paying the $776 item at various times, that was paid him to balance that loan? A. I gave him this statement —it is preliminary and not conclusive.

186 Q. It is final except the $776 item that was due him? A. It was subject to correction, this was, if there was an error in it.

Q. So if there is an error in it? A. It seems to be correct.

Q. It is correct, is it? A. It seems to be so.

Q. That is a final statement, Mr. Kimball, except the item of $776.15 which was still due Mr. Bron? A. Yes,—it was—

Q. Answer that question yes or no; there is no catch in it; I want wou to get down somewhere where you can—

By Mr. Harris: We insist, your Honor, the witness has a right to make an explanation.

Q. Do you know of any items paid out on that $700 loan except as shown by Exhibit K? A. I do.

Q. Exhibit K, you will observe includes $776.15 to Bron's credit? A. It does.

Q. Now, what else have you paid out upon that?

By Mr. Harris: We interpose an objection in there, your Honor, on behalf of the New Hampshire Savings Bank, that that can't have anything to do with the amount paid the New Hampshire Savings Bank on the proof of the date of the note and delivery of the note, as to the New Hampshire Savings Bank.

By Mr. Holmes: That it is incompetent, irrelevant, and immaterial.

By Mr. Harris: As directed to the claim of Kimball individually, I wouldn't have any objection.

Q. Mr. Kimball, you didn't pay out any more than $7500
187 on that $7500 loan, did you?

Objection.

Overruled.

A. Yes and no.

Q. Will you kindly explain your yes? A. There was a $50 commission charged on that loan which Mr. Bron was

charged with, making $7550 in all.

Q. So you performed the financial stunt of paying out $7550 on a $7500 loan, did you? A. By charging and crediting the commission on both sides, yes?

Q. Any other things that you paid out on that $7500 loan in addition to this commission? A. Not that I remember.

Direct examination of Charles Bron, Jr., by Mr. Harris.

Q. Will you examine this Exhibit L, Mr. Bron, and state if you assisted in the preparation of this exhibit? A. I did not.

Q. Nor any part of it? A. The only thing I did was to mark the checks in the book after they were pasted in the book.

Q. Do you know whose handwriting this is? A. Mr. Buckley's, I think, or the stenographer.

Q. Did you assist in making this up? A. No sir.

Q. Any of the items? A. No sir.

Q. Not at all? A. Not with that book.

Q. Did you give him any items? A. I gave him all the checks, that is where he got his items from.

188 Q. The items in here that are no part of the checks, did you furnish them? A. I wrote all these items here.

Q. Yes, I understand that. Look at Exhibit No. 262, and state what that check was given for. A. That check was given for excavating.

Q. On what A. On Waco. I think I marked it on the book.

Q. Was that at the time the work was finished? A. I couldn't tell you, I think there was one in here some place that I put a receipt on the back.

Q. I ask you about this check. A. About this? Well, this check might be for some other work.

Q. You couldn't swear it was on Waco? A. It might have been given while we were working on Waco.

Q. They were excavating up there on Waco? A. I don't mean it was for excavating.

Q. You say so, don't you? A. I will recall that.

Q. You have marked this check that it was for excavation? A. Yes sir.

Q. And you put this on here, yourself? A. Yes sir.

Q. When did you put that on there? A. That was last March, I think.

Q. At that time that was put on there by you as showing for excavation for the Waco property? A. I don't think it is shown to be any property.

Q. You put it down here? Didn't you intend this to be on the Waco job? A. . . . . figure up from the time we started the Waco job.

Q. What other excavating was being done at that time?

189 A. I don't think they were doing any other excavating at that time.

Q. You marked that excavating? A. Yes sir.

Q. At the time you did it your memory was fresher about the matter than it is now, wasn't it? A. No sir.

Q. Then as time goes by your memory gets brighter? A. Yes sir.

Q. But when you got that check or furnished that information when that book was made some months ago you marked that excavation? A. Yes sir.

Q. And intended it as to the Waco job? A. I didn't intend it as to the Waco job, no sir, but I will explain that if you will let me.

Q. You may look at check No. 267. A. Yes sir.

Q. You needn't look at the back of that; you look at the front of it. A. I wrote it.

Q. You marked this excavation? A. Yes sir.

Q. And the date of that is January 29th? A. 28th.

Q. What was that for excavating on? A. That was for excavating on the Waco.

Q. On Waco A. Yes sir.

Q. The amount of that check is $17.35? A. $17.35.

Q. That check was given when the work was finished,
190 wasn't it? A. Why that check was—we had a settlement at that time.

Q. You had a settlement? A. Yes sir.

Q. The work was just done, wasn't it? A. No, I think that work had been done before that time; I wouldn't say for certain, but I am pretty near satisfied it was done before that time.

Q. Were these people in the habit of letting their account run with you on this matter? A. Sometimes.

Q. It wasn't very long after it was done, was it?

By Mr. Brubacher: We object to this line of interrogating this witness. It is their witness.

By Mr. Harris: It is not our witness.

By Mr. Brubacher: The question is leading, suggestive, incompetent, irrelevant, and immaterial; and it doesn't show any connection between the commencement of the building, and does not tend to show or prove or disprove any matter in connection with the commencement of the building.

By the court: The objection is overruled. Mr. Harris, you say this is not your witness?

By Mr. Harris: It is not ours.

By the court: Stand aside.

By Mr. Harris: He testified as to this check and we offered this check as relative to when that work was done.

By Mr. Brubacher: You haven't asked any leave to open up the case and he is not our witness.

By the court: Do you want to further cross examine him?

191 By Mr. Harris: Yes sir.

By the court: Proceed.

Q. Now on the back of this check "G," 267, appears to be an endorsement—a receipt signed by Underwood and Jones. A. I think that is the payment in full.

Q. For that job? A. 905 North Waco.

By Mr. Harris: The check is dated January 28, 1911. We now offer this check Exhibit G, check 267, both as to the matter on the front of the check, as well as the receipt on the back.

By Mr. Brubacher: Objected to as incompetent, irrelevant, and immaterial, improper cross examination, not touching on anything on our examination.

By the court: Overruled.

Exception.

RE-DIRECT EXAMINATION, by Mr. Brubacher.

Q. How much, all told, Mr. Bron, was taken out of that cellar. I think that we figured that cellar right onto 350 yards, 340 something.

Q. Cubic yards? A. Yes sir.

Q. At 35c? A. Yes sir.

Q. That would make $152.35? A. I don't know; I haven't figured it up.

Q. What explanation have you, Mr. Bron, to make relative to the paying of this item on January 17th? A. I think tha was on the settlement; I don't think we figured up the cellar until that time, as to what it had come to.

Q. The cellar previous to that time had been finished?

192 A. Yes sir.

Q. These men had been working for you prior to this time, had they? A. Yes sir.

Q. And subsequent? And at that time? A. Yes sir.

Q. And they didn't always draw their money, did they, at the precise day on which a job was completed A. No sir.

Q. Frequently you didn't have the money, perhaps? A. Yes sir.

Q. Do you say that—how long would you say that the cellar had been completed on that job before your check dated January 28th?

By Mr. Harris: If you please, your Honor, this is not cross examination and it is not direct examination, because they proved all this on the start.

By the court: I think you went into that very fully yesterday with this witness and others. They gave you the time when they dug out the bottom. Mr. Hoff indicated the date when the bottom was leveled excepting a roadway for the teams to go out. Sustained.

By Mr. Brubacher: Exception.

By Mr. Harris: I ask leave to ask this witness one question in answer to a question yesterday which I had overlooked relative to the value of the building, which he said cost $13000, three or four hundred dollars.

By Mr. Brubacher: We object to any further cross examination of this witness; he has had three whacks at it.

By Mr. Gardner: It is immaterial.

193 By the Court: The application will be denied.

By Mr. Harris: Exception.

DIRECT EXAMINATION OF ROY BUCKLEY, by Mr. Yankey.

Q. Mr. Buckley, did you prepare these books? A. I did.

Q. Did you prepare these books that are in this estate as the records of Mr. Bron? A. Yes sir.

Q. Where did you get the information that are in these books? A. In the first place, I had two shoeboxes full of cancelled checks which were pasted in the three invoice books, and then posted to a check book and from there to the ledger on the credit side of the ledger under the names to whom they were given. Then on the margin of the invoice books written in pencil I got a little of that from the two Mr. Brons, Charley Bron and Charley L. Bron, and the ledger I got some from Carl Graham Paint Company . . . North End Hardware Company, E. L. Pennington, Haines Tile & Mantel Company, all the accounts in the ledger . . . . . being about 400 accounts in the ledger.

Q. I will ask you where did you get the information to put the entry opposite the checks that appear on these three check books? A. Which information? This?

Q. Yes. A. I got this different places.

Q. Whose writing is this at the edge of the check in the invoice book? A. Part of that is mine and part of it is Mr. Bron's, I believe.

Q. Calling your attention to a check marked Exhibit C on page 14 of book 1, who gave you the information opposite that check? A. I believe I got it from one of the Mr. Brons,
194 I don't know which. There was about 400 checks; I don't remember exactly; I didn't see Mr. Underwood because I couldn't find him.

Q. Now, then, the book marked Ledger, where did you get

the information contained in this book? A. I made the credit side from the information obtained around town from the North End Hardware—and all the creditors I could find.

Q. You didn't have any information on this matter except what you got from inquiry from other people? A. That's all.

Q. Now then, I call your attention to page 30 of the ledger, the account of C. L. Underwood, and ask you where you got the information that appears on that account? A. I don't remember exactly; I know at the time that I couldn't find Mr. Underwood; I looked up the address in the directory, and I couldn't find him; I may have gotten the information from one of the two Mr. Brons.

Q. To the best of your recollection, where did you get the information that appears on that account? A. Now I wrote there that in pencil.

Q. Whose writing is that? A. I think that is mine; I am not sure.

Q. Whose writing is this, 1, 5? A. That is mine.

Q. Where did you get the information? A. I am not sure; I didn't get it from Mr. Underwood; I remember I couldn't find Mr. Underwood. It was Charley Bron or Charley L. Bron.

Q. You didn't have any information yourself? A. No sir, not a bit.

Q. You got part of the information that you have in here from Brons? A. Yes sir.

195 Q. Whatever appears in there, you got that information from somebody? A. Yes sir.

Q. Do you have any recollection now of having obtained that information from either of the Brons, or from Mr. Jones? A. No, I do not. I don't remember which one it was from, but I know that I didn't get that from Underwood or from any of those parties because I can see the difference in the writing.

Q. Do you know Mr. Jones? A. No, I can't say I do. Sitting back of Mr. Rorabaugh.

Q. Have you seen him before? A. Yes.

Q. Is it your recollection as having gone to see him? A. No I didn't go down to see him.

Q. Do you have any recollection of his having been at the office? A. No, I have not.

Q. Now then, Mr. Buckley, opposite the matter just referred to is a list of credits; who made these entries? A. I did. Those are just copies of the checks, check numbers and dates and amounts.

Q. Did you go over the books which appear designated as invoice books, and which contain the checks of Mr. Bron, and enter (?) these accounts of all the checks? A. Yes sir: I pasted these checks in the books, and all the information.

Q. Now then, Mr. Buckley, from the account of C. L. Underwood, will you say that you have gone over the checks, and all of the checks that were paid to Mr. Underwood according to the invoice books that you have here appear on that account?

By Mr. Brubacher: We object as incompetent, irrelevant, and immaterial.

By Mr. Brown: This ledger book is immaterial.

By Mr. Brubacher: Not the best evidence.

196 By the Court: I think the objection will have to by sustained.

Q. Now then, Mr. Buckley, you prepared this account with the items of checks here from the checks as they appear in this book? A. Yes sir.

Q. You went over all these checks? A. Yes sir.

Q. Can you tell the court how many checks were missing from this as they were numbered? A. I numbered this when I pasted them in. The checks were not numbered. I pasted in by dates, the oldest check first, and then took a numbering machine and numbered them right down.

Q. All of these checks you have introduced here and that are put in this book are all the checks Mr. Bron turned over to you? A. All I ever saw.

Q. All these checks that appear in these books designated invoice books, have they been entered in the different accounts in the book marked as a ledger?

By Mr. Brubacher: We object as incompetent, irrelevant and immaterial.

A. Every check in that book is listed in that other; there is not a mistake unless one is listed in twice.

Q. Now then, take the account of C. L. Underwood. You say that all the checks made to C. L. Underwood in this book—in the invoice books, are on the account of C. L. Underwood in the ledger? A. Yes.

Q. Now then, is the same not true with respect to the
197 account of J. A. Jones, which appears in this book?

A. They are there in this book unless it is a mistake I don't know about.

Q. Outside of a mistake? A. Yes sir, that I don't know about. Jones account the same way.

Q. Using this book to refresh your recollection, and looking at the account of C. L. Underwood, I will ask you how many checks appear in the invoice books, to C. L. Underwood up to February 1, 1911?

By Brubacher: We object as incompetent, irrelevant and immaterial, not the best evidence. The invoice book will show for itself.

By the Court: If he knows, how many, he may state.

A. The book says there is two, that's all I know.

Q. Turn to the account of Jones and use that to refresh your recollection, and I will ask you how many checks were made

to J. A. Jones up to the 1st of February, 1911.

By Mr. Brubacher:, We object as incompetent, irrelevant, and immaterial, calling for hearsay testimony, and not the best evidence; and calling for a transaction of which this witness has no personal information whatever.

By the Court: You may answer that.

A. There is two in that book and in this book . . .

By Mr. Brubacher: We move to strike out the answer as not responsive to the question.

By the Court: Overruled.

Q. Referring to the account of Underwood, will you find in this book the first check that appears to Underwood? A. Right here, check no. 170.

Q. Has that been identified in evidence as an exhibit?

198 By Mr. Brubacher: We object to that as calling for a conclusion of the witness.

By the Court: Sustained.

A. It is marked Exhibit C.

Q. What is the next check? A. 262.

Q. I withdraw that question. I now call your attention to a check marked Exhibit M. being check 262 in the invoice book, and ask you if that is the next check in the Underwood account?

By Mr. Brubacher: We object to that as hearsay, not the best evidence.

By the Court: The objection is sustained.

Q. Mr. Buckley, I will ask you if check No. 170, marked by the stenographer Exhibit C and purporting to be for $15, to C. L. Underwood, and if check 262 marked Exhibit M, being a check to C. L. Underwood, for $17, are the two checks that appear on the Underwood account.

By Mr. Brubacher: We object to that as not the best evidence.

By the Court: Sustained.

Q. Asking leave to amend my question, I now ask you if the two checks that I referred to in my previous question are the only two checks that appear in this book to C. L. Underwood up to the 1st day of February, 1911.

By Mr. Brubacher: We object to that as incompetent, irrelevant, and immaterial, and this book will show whether they are the only two checks or not.

By the Court: Overruled.

Exception.

A. Yes sir.

199 Now then, Mr. Buckley, calling your attention to check marked Exhibit D, and check marked Exhibit N by the stenographer, and appearing in the invoice books as check 226 and 267, I will ask you if those are the only two checks that appear in the invoice books to J. A. Jones up to February 1, 1911. A. Yes sir.

CROSS EXAMINATION, by Mr. Brubacher.

Q. You don't know what other checks may have been given to Jones or Underwood? A. No, of course not.

Q. For the Waco Street job? A. No.

Q. You have no personal information of what checks were given? A. No.

Q. You have no personal information as to the correctness of any of these books, checks, or anything, except what somebody has told you?

By Mr. Yankey: I object to that as not proper cross examination.

By the Court: Overruled.

A. I know that the books are partially.

Q. Well, you have no personal information as to the correctness of any check as to amount, date, or circumstnces under which it was given by Mr. Bron, have you? A. No.

Q. You have no knowledge—no personal information as to the correctness of any book that you compiled so far as it purports to contain a correct statement of what actually occurred, have you? A. Some of those accounts I have.

200 Q. You have no personal knowledge that the books correctly state the transaction on which you have been interrogated this morning? A. No, not those accounts.

By Mr. Brubacher: We move to strike out all this witness' testimony with reference to what he has been interrogated about this morning.

By the Court: Overruled.

By Mr. Brubacher: Exception.

By Mr. Brown: If your Honor please, we have found a witness since yesterday, and who is in the country, and I tried to call up the place where he is, and I can't raise any body out there. The testimony is to the effect that he was present when this sewer pipe was broken by the excavators, and at that time he had seen this work progressing from day to day, and it was over a week prior to that that he knows the work first was begun on that place. The party is Mr. Schuyler Jones, who lives next door to this property. This sewer connected Mr. Jones' house with the——

By Mr. Harris: I object, they closed their case yesterday.

By Mr. Brown: I found out about this witness since we closed the case. He will be in at noon.

By the Court: We will proceed with the Market Street property. If this witness gets in here and it is convenient, the case is still open.

Noon Adjournment.

DIRECT EXAMINATION OF SCHUYLER JONES, by Mr. Brown.

Q. Will you please state your name? A. Schuyler
201 Jones.

Q. You live here in Wichita? A. Yes sir.

Q. Where do you live with reference to the flat that Mr. Bron built north of P. J. Conklin's residence on Waco Street? A. I live at 911 Waco, that would be the first building site north of the flats.

Q. You lived there, did you, in the year 1911? In the latter part of 1910, and first part of 1911? A. Yes sir.

Q. You had a sewer running from your house across those lots where this flat was building, going across to Mr. Conklin's house, and eventually going into the city sewer, did you? A. It runs—starts at Judge Dale's, if I understand it right, runs through Sweet's property, and then through mine, Schuyler Jones and donw through the Conklin property, and I understand from there it runs into the city sewer.

Q. Mr. Jones, along in the fore part of 1911, I understand that the sewer was broken where Mr. Bron was building this flat building, or starting this flat. Do you remember of such an occurrence? A. Whether it was the fore part of 1911 or not, I am not able to say, Mr. Brown; I remember the sewer breaking and my folks said to me when I came home——

By Mr. Harris: I object to stating what anybody told him.

A. Well, my attention was called by the folks at home that the sewer had broken in the cellar, and I wanted to take care of it.

By Mr. Harris: I object to that.

A. I see the sewer had broken next morning.

Q. Now Mr. Jones you had been at home off and on every day preceding that for some time? A. Yes
202 Q. You weren't out of the city? A. No.

Q. Did you notice anybody working on that lot prior to that time?

By Mr. Harris: I object to that for the reason the witness testified he don't know whether it was in 1911 or 1910.

Q. I will withdraw the question. Mr. Jones, at the time this sewer was broken, what was being done on this lot? A. The cellar was being dug.

Q. Do you know anybody in the room that was working at that time on the digging of that cellar? A. The gentleman right over there was working on the cellar.

(Witness indicates Mr. Underwood.)

By Mr. Brown: Stand up.

A. That's the gentleman that was working on the cellar.

Q. Now you had observed this location prior to the time of the breaking of the sewer?

By Harris: We object as assuming a fact not proven.

Q. Mr. Jones, immediately following the breaking of this sewer, can you tell whether it was repaired? A. Well, that was the best I can remember, while I can't give you no dates in regard to that, but the best as I can remember it was probably a week or ten days, or maybe two weeks. I should judge it probably stayed that long before it was repaired.

Q. How was it fixed at the time you refer to ? A. You mean the final fixing?

Q. Yes, two weeks later.

By Mr. Harris: We object as incompetent, irrelevant
203 and immaterial.

By the Court: Overruled.

A. Well, they came and asked me if they could go through my yard; they had to get a certain fall,—it was hard to get any fall, and they had to come into my yard 25 or 30 feet to start over again to make a good fall, if I may explain; in digging this cellar right at this northwest corner, they had a place to come out with the dirt, and as they came out through there they finally struck this sewer; it was in this corner in that position; what broke it I don't remember, the scraper, probably broke it; and I should judge the sewer was down in there probably I don't believe over two feet; so when they started in my yard they came around to come along and go by this corner here so that the sewer—they probably went west two or three or four feet to get it into deep ground where that porch (?) would never bother the sewer again; you see the slant (?) would catch it; they went around here, and then went on south.

Q. That is the time you referred to? A. Yes, the time they fixed it.

Q. Now, Mr. Jones, do you know whether they were working on that cellar the day before the sewer was broken? A. No of course I don't remember that.

Q. Do you remember of seeing them work there prior to the time the sewer was broken? A. Oh, yes.

Q. Do you remember seeing them digging a cellar or ex-

cavating for the building prior to when that sewer was broken? A. Yes sir.

Q. Will you please tell me how long prior to the time the sewer was broken you saw them excavating for that building?

A. Well, that's something I can't give you any definite
204 answer in regard to that, but as I would remember of it—Oh, I should judge it was any place from ten days to two or three weeks. Of course while this wouldn't establish any evidence, I remember the ground was frozen two or three inches; the men came to break ground, and I was getting some raspbery roots out and saving them as they were breaking and throwing this ground back to get the plow into the ground. And how many days it was from the time they broke ground, that would be something I couldn't tell you.

Q. To the best of your recollection, how long? A. It might have been, I believe, from ten days to three weeks, Mr. Brown, the best I can remember.

CROSS EXAMINATION, by Mr. Harris.

Q. You don't have any distinct recollection as to the dates?
A. No I don't, Mr. Harris, I couldn't state no dates.

Filed in U. S. District Court, April 15, 1913.

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205 In the District Court of the United States for the District of Kansas, Second Division.

In the matter of Charles Bron, Bankrupt.

In Bankruptcy, No. 585.

Petition for Review of G. F. Varner and W. E. Marshall, as the Wichita Lumber Company.

To the Hon. C. V. Ferguson,

Referee in Bankruptcy.

Your petitioners are creditors of Charles Bron, the above named bankrupt, and compose a partnership under the firm name and style of The Wichita Lumber Company, which is composed of G. F. Varner and W. E. Marshall; that you petitioners number 15 in the amount of $3145.81, and your petitioners claim number 21 1-2 in the amount of $1136.84 have been allowed herein as secured claims in the amounts aforesaid.

That on January 27, 1913, an order, a copy of which is hereto annexed, was made and entered herein; that manifest error to the prejudice of your petitioners was made, and such order was and is erroneous, among others, for the following reasons:

Specifications in Error.

First.

That Referee erred in not allowing said claim number 15 for $3145.81, as a first lien upon the following described real estate in Sedgwick County, Kansas, to-wit: A tract of land beginning 206 feet North of the Northeast Corner of lot 111 on Waco Street in the original town of Wichita; thence West 200 feet; thence South 48 feet; thence East 200 feet; thence north 48 feet to the place of beginning, and to the funds arising from the sale of said property, co-equal with the
206 mechanics liens of like character against said property, and said funds, and prior and superior to the mortgage lien of The New Hampshire Savings Bank of Concord, New Hampshire, number 19, in the sum of $8312.50.

Second.

The Referee erred in not allowing said claim number 15 for $3145.81 as a first lien upon said real estate hereinbefore described, and to the funds arising from the sale of said property co-equal with the mechanics liens of like character against said property, and said funds and prior and superior to the mortgage lien of P. J. Conklin number 45 in the sum of $5218.00.

Third.

The Referee erred in not allowing said claim number 15 as a first and prior lien on the improvements erected on said real estate hereinbefore described, independent of said real estate and to the pro rata funds arising from said real estate and improvements co-equal with all other mechanics liens of like character on said property and said funds and prior and superior to the mortgage lien of the New Hampshire Savings Bank number 19, in the sum of $8312.50.

Fourth.

The Referee erred in not allowing the said claim number 15 for $3145.81 as a first and prior lien on the improvements erected on the real estate hereinbefore described independent of said real estate and to the pro rata funds arising from the sale of said real estate and improvement co-equal with all other mechanics liens of like character on said property and said funds and prior and superior to the mortgage lien of P. J. Conklin number 45 for $5218.00.

207 Fifth.

The Referee erred in not allowing said claim number 15 as a second lien on the real estate hereinbefore described including the improvements thereon and to the funds arising from the sale of said property co-equal with all other mechanics liens of like character against said property and said funds subject only to claim number 19 of the New Hampshire Savings Bank to the extent of $5218.00 and no more.

Sixth.

The Referee erred in not allowing said claim number 15 for $3145.81 as a second lien co-eqeual with all other mechanics liens of like character against the improvements on the real estate hereinbefore described, independent of the real estate and to the pro rata funds arising from the sale of said real state and improvements, subject only to claim number 19 of the New Hampshire Savings Bank to the extent of $5218.00 and no more.

Seventh.

The Referee erred in not allowing said claim number 21 1-2 for $1136.84 as a first lien upon the following described real estate in Sedgwick County, Kansas, to-wit: Lots 8 and 9 on Second Street in Fire Baugh's Sub Division of Chautauqua addition to the City of Wichita, and from the funds arising from the sale of said property co-equal with all other mechanics liens against said property and said funds and prior and superior to the mortgage lien of Ruth Dillon number 48, in the sum of $1660.00.

Eighth.

The Referee erred in not allowing said claim number 21½ for $1136.84 as a first and prior lien upon the improvements erected on said real estate last described, independent of
208 said real estate and to the pro rata funds arising from the sale of said real estate and improvements co-equal with all other mechanics liens of like character on said property and said funds and prior and superior to the mortgage lien of Ruth Dillon, number 48, for $1660.00.

Wherefore, Your petitioners, feeling themselves aggrieved, pray that said order may be reviewed as provided in the Bankruptcy act of 1898, general order number 27, and general order number 3 of this Court.

G. F. VARNER and W. E. MARSHALL,
As The Wichita Lumber Company, Petitioners.

Brown & Brown and Brubacher & Conly,
Attorneys for Petitioner,

P. O. address, Wichita, Kansas.

State of Kansas } ss.
Sedwick County }

I, W. E. Marshall, a member of said partnership firm and one of the above mentioned petitioners and claimants herein, and described in the foregoing petition, do hereby make solemn oath that the statements and facts therein contained are true according to the best of my knowledge, information, and belief.

W. E. MARSHALL.

Subscribed and sworn to before me a Notary Public in and for the County of Sedgwick and State of Kansas, on this 6th day of February A. D., 1913.

F. A. GACKENBACH,
(Seal) Notary Public.

My commission expires January 27, 1917.

Filed in the U. S. District Court April 15, 1913.

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209 In re Charles Bron, Bankrupt.

No. 585 Bankruptcy. (172 Civil) No. 1.

Memoranda of Decision on Certificate of Referee to Review His Order Establishing Claim of Mechanics Lien Holders G. F. Varner and W. E. Marshall, Partners, Doing Business as The Wichita Lumber Company, as Inferior to a First Mortgage Lien of Claimant New Hampshire Savings Bank, and Inferior Also to a Second Mortgage Lien in Favor of P. J. Conklin, on What is Known as the "Waco Street Property."

The facts are, prior to January 3, 1911, P. J. Conklin was the owner of a lot or tract of vacant ground in the City of Wichita, fully described in the record and commonly called the "Waco Avenue Property." On that day Conklin sold that property to the bankrupt who was engaged in the business of buying city lots and causing the same to be improved by the erection of buildings thereon. In this case the bankrupt agreed to purchase the vacant property from Conklin for the consideration of $4500, an amount which must have been much in excess of its true market value, for it was agreed Conklin should take from the bankrupt a mortgage, not alone to secure the entire purchase price of the land, but a mortgage inferior to a prior mortgage of $7500, which amount was probably double the actual value of the lot in its then condition. This agreement was carried out and Conklin conveyed the vacant property to the bankrupt and the bankrupt executed and delivered a first mortgage to one E. D. Kimball to secure $7500 and a second mortgage to Conklin for $4500, and also a commission mortgage. The note secured by the first mortgage was soon after its making, before the building was completed, transferred by Kimball to the Savings Bank. From all this,
210 it must be clearly apparent, so far as Conklin, Kimball and the bankrupt were concerned, they did not rely on the property covered by the mortgage in its then condition as security for the money advanced on the first mortgage or to secure the purchase price of the land, but did contemplate and rely on the fact that the property would be improved, and that the mortgagee would attach to the improvements to be made thereon, which would contemplate the mortgages should attach to the property in its improved condition, and the product of the labor of the workmen thereon, if they should not be paid

by the bankrupt. Thereafter, this property was caused to be improved by the bankrupt at large expense. Many mechanics' and laborers' liens were filed against the property as improved, aggregating some $7946.50. The contest presented arises over an order of the referee establishing the mortgage liens before mentioned prior in point of equity to the liens of the mechanics and laborers. The Wichita Lumber Company, a partnership, composed of G. F. Varner and W. E. Marshall, have petitioned for a review of said order. The referee has certified the question for review.

From an examination of the certificate of the referee, it is seen he found as a fact work was commenced on the property at an early hour on January 3, 1911. That the conveyance of the property from Conklin to bankrupt, and the mortgages made by the bankrupt, were all executed and filed for record on the same day. The referee further states in his certificate as follows:

"And the further question arose: Which of the respective claimants was entitled to the first, second and third lien on the funds. And it was determined that the lien created by the mortgage from Bron to Kimball and assigned to the New Hampshire Savings Bank vested immediately upon its execution, delivery and record and was a first lien on the premises; and the mortgage to Conklin by agreement between the parties, created a lien on the premises; and the creditors having mechanics liens, which were co-equal, were entitled to a third lien, without preference to any one of them, their liens not having precedence over the mortgages, the actual beginning of the building
211 not having been commenced until after the third day of January, 1911, the work done by the bankrupt on that day being fraudulently done by the bankrupt for the purpose of giving preference, over the two mortgages, to any mechanics liens to be thereafter created and established."

The property has been sold by the bankrupt court, freed from liens, and the proceeds are now in court awaiting distribution to the claimants.

As the property did not sell for an amount sufficient to satisfy all the liens, it is manifest a loss must be borne by some one. The question is, under the facts stated, on whom should this loss fall? The material men and laborers who furnished the materials and created the building which improves the property, or, the mortgagees, one of whom furnished the unimproved property, and took a second lien thereon, which, at the time it was taken, constituted no security at all; or, on the other, the Savings Bank, which took its mortgage from Kimball at a time when the property was being improved and in such state as to be no adequate security for the amount advanced by it on the mortgage? This question must be answered by reference to the laws of this state providing for mechanic's liens, as construed by the Supreme Court of the State.

Section 6244, Gen. Stat. 1909, provides, as follows:

"Any person who shall under contract with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon; or who shall furnish material or perform labor in putting up of any fixtures or machinery in, or attachment to any such building, structure, or improvement; or who shall plant any trees, vines, plants, or hedge, in or upon said land; or who shall build, alter or repair, or furnish labor or material for building, altering or repairing any fence or footwalk in or upon said land, or any sidewalk in any street abutting said land, shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for such labor, material, fixtures or machinery. Such liens shall be preferred to all other liens or incumbrances, which may attach to or upon said land, buildings or improvements, or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures, or machinery, the planting of trees, vines, plants or hedges, the building of such fence, footwals or sidewalks, or the making of any such repairs or
212 improvements."

Subsequent sections provide the manner of filing, preserving and enforcing such lien. As no question arises in this matter over the validity of the Lumber Company's lien, and as the only question in issue is as to which lien first attached to the property, and as the statute provides "Such liens shall be preferred to all other liens or incumbrances which may attach to or upon said land, buildings or improvements, or either of them subsequent to the commencement of such building," etc., it is self-evident the question presented is one of fact as to when the building on the lot is to be deemed to have been commenced, as that word has been employed in the statute.

In this respect, as has been seen, the referee finds in conformity to the proofs found in the record the first work was actually done on the lot toward the construction of the improvement early on the morning of January 3, 1911, prior to the time of the filing of the mortgages. However, the referee declines to take this as the time at which the building was actually commenced because of the intent which he finds in the mind of the bankrupt to prefer the mechanics and laborers to the mortgagees. However, the intent with which the bankrupt acted in this matter, even if true in point of fact, is not the criterion by which the rights of the parties litigant are to be judged and determined. If the work was commenced on the improvement within the meaning and intent of the statute, prior to the time at which the liens of the mortgages attached by their being filed for record, then the mechanics' liens are prior in point of equity to the liens of the mortgagees and

must be so declared as to the Lumber Company here petitioning for review. Under the decisions of the Supreme Court of this state, there can be no doubt but that when the work of excavation for the foundation or cellar of a building to be erected is begun, the work of improving the property has
213 commenced within the meaning of the statute, and that any person can then search the records, and if no mortgage or other incumbrance be found of record, he may safely rely on his rights under the law to perfect a mechanic's lien in the furnishing of labor or material used in the construction of such improvement. As against any such encumbrance thereafter filed. Nixon v. Sydon Lodge, 56 Kan. 302; Mortgage Co. v. Weyerhaueser, 48 Kan. 335; Thomas & Co. v. Mowers, 27 Kan. 265, and cases cited.

Under all the circumstances of this case, the facts found in the record and stated by the referee, I am of the opinion the mechanic's lien of the Lumber Company is, and of right should be, prior in equity to the mortgage of the Savings Bank, the mortgagee of claimant Conklin and the commission mortgage. More especially is the result reached equitable and just when it is considered neither Conklin, Kimball nor the Savings Bank, who took liens to secure more than $12000 on property when taken not worth more than one-fourth that amount, took no steps to see the proceeds of the first mortgage were applied in satisfaction of the demands of mechanics and material men who created the improvement to which all the while they expected to look for security, well knowing if they did not so do, and the same remained unpaid, as in this case, by the bankrupt, to realize on their securities they must appropriate to their use the property and labor of others, in such case equity must demand and the statute law of the state does protect the mechanic and laborer in that which he has thus created.

On the petition to review, and certificate, the order of he referee must be set aside and the Lumber Company allowed a first lien on the property for the amount of its demand, as must all mechanics' lien holders, who furnished labor and material which went into the improvement of the property, and whose liens have been by the order sought to be reviewed
214 by the certificate here established as inferior to the mortgages on said property, where such lien holders, being dissatisfied with the order made, have, in a proper manner, petitioned for a review of said order.

JOHN C. POLLOCK, Judge.

Filed in the U. S. District Court, June 26, 1913.

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215 In the Matter of Charles Bron, Bankrupt.

No. 585. In Bankrupty. (Civil No. 172.)

In Re Petition for Review of C. F. Varner and W. E. Marshall.

Partners Doing Business as The Wichita Lumber Company, From the Order of the Honorable Referee C. V. Ferguson. It is Ordered:

(1) That the petition of The New Hampshire Savings Bank and P. J. Conklin for re-hearing in the above entitled matter heretofore granted be and the same is hereby denied and the memoranda of decision heretofore made is adhered to.

(2) That the order of the Referee made January 27, 1913, establishing the mortgage lien of The New Hampshire Savings Bank, No. 19, in the sum of $8312.50 as a first lien, and the claim of P. J. Conklin, No. 45, in the sum of $5218.00 as a second lien, and the following named mechanics lien claimants in the sum set opposite their respective names, to-wit:

No. 15	The Wichit Lumber Co.	$3145.85
No. 31	The Haines Tile & Mantel Co.	$1521.20
No. 13	The Jackson-Walker Coal & Material Co.	$1029.45
No. 41	A. S. Orr as The North End Hardware Co.	$ 299.72
No. 12	The Homebuilders Association	$ 134.55
No. 28	Titus-Higley Lumber Co.	$ 261.70

aggregating $6392.43, as a third lien equal without preference on what is known as the Waco Street property, and the proceeds thereof, amounting to $12,600.00, be and the same is hereby reversed.

216 (3) That said mechanics liens in the sums aforesaid with interest thereon at the rate of six per cent per annum from October 22, 1912, to the date of distribution, be, and the same are hereby established as first liens, equal in priority on said property and the proceeds thereof. That the said claims of The New Hampshire Savings Bank in the sum aforesaid with interest thereon as aforesaid, be, and the same is hereby established as a second lien on said property and the proceeds thereof; that the claim of P. J. Conklin in the sum aforesaid, with interest thereon as aforesaid, be and the same is hereby established as a third lien on said property.

(4) That the order of payment of said claims be as follows:

a. To said mechanics lien claimants in the sum hereinbefore set opposite their respective names, with interest thereon as aforesaid, in full and without abatement.

b. To The New Hampshire Savings Bank, all of the remainder of the said proceeds after the payment of all prior debts and said mechanics liens.

c. That the claims of P. J. Conklin abate, there being no funds arising from the sale of said property with which to pay the same.

(5) That the costs of this appeal, taxed at $..... be paid equally by The New Hampshire Saving Bank and P. J. Conklin.

(6) That said mechanics lien claimants be paid the said sums due on their respective claims upon the execution to The New Hampshire Savings Bank and P. J. Conklin of an undertak-

ing by such lien claimant with The Fidelity & Deposit Company of Baltimore as security and approved by the Clerk of
217 this Court in the amount of their respective claims plus $100.00 in each of said claims, conditioned for the return on demand of said money so paid if it be finally decided that said money should not have been paid.

To each and every part and portion of the above order, The New Hampshire Savings Bank and P. J. Conklin each duly except.

Notice of appeal by New Hampshire Savings Bank and P. J. Conklin was given in open court and the same was allowed.

Done at Wichita, Kansas, this 1st day of Oct., 1913.

JOHN C. POLLOCK, Judge.

Filed in the U. S. District Court Oct. 1, 1913.

In the Matter of Charles Bron, a Bankrupt.
218 In Bankruptcy.

The New Hampshire Savings Bank, and P. J. Conklin, Appellants,

vs.

G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, Appellee.
No. 172 Civil.

ASSIGNMENT OF ERRORS ON APPEAL.

Now, on the date last hereinafter written, comes The New Hampshire Savings Bank, appellant, by its attorneys of record, Kos Harris & V. Harris, and P. J. Conklin, appellant, by his attorneys of record, R. L. Holmes, Charles G. Yankey and W. E. Holmes, and allege and aver that the judgment and decree in the above entitled action is erroneous and against the just rights of The New Hampshire Savings Bank and P. J. Conklin for the following reasons, to-wit:

First.

The court erred in setting aside and reversing the orders and decisions made by the Referee in this proceeding.

Second.

The court erred in allowing the mechanic's lien claimant G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, a first lien on the proceeds of the sale of the Waco Avenue property and erred in adjudging that the said mechanic's lien claimant was entitled to a first lien on the proceeds arising from the sale of the Waco Avenue property.

Third.

The court erred in not finding, allowing and establishing
219 the lien of The New Hampshire Savings Bank, under its mortgage, as a first lien on the proceeds of the sale of the property on Waco Avenue.

Fourth.

The court erred in finding, allowing and establishing the lien of P. J. Conklin upon the proceeds of the sale of the property on Waco Avenue as second and inferior to the lien of said mechanic's lien holder.

Fifth.

The court erred in its finding or conclusion that P. J. Conklin sold the Waco Avenue property to Charles Bron for a greater sum of money than its fair market value.

Sixth.

The court erred in its finding or conclusion that the Referee found that the work was commenced early in the morning of January 3rd, 1911, whereas the finding of the Referee was that any work commenced by Bron, the bankrupt, on the morning of January 3rd, 1911, was not an honest, bona fide commencement, but was commenced merely to defeat the mortgages held by P. J. Conklin and The New Hampshire Savings Bank.

Seventh.

The court erred in finding and concluding that Charles Bron had any right, title or interest in said property prior to noon of January 3rd, 1911, or prior to the delivery of the deed to said Bron and the delivery of the mortgages to The New Hampshire Savings Bank's assignor and P. J. Conklin.

Eighth.

The court erred in finding or concluding that The New Hampshire Savings Bank did not rely upon the property as security for its first mortgage, taken from E. D. Kimball, the mortgagee in said first mortgage.

Ninth.

220 The court erred in not finding that P. J. Conklin had a first lien on the property as between him and said mechanic's lien claimant, by reason of his mortgage being given for purchase money of the property.

Tenth.

The court erred in finding that Bron, the bankrupt, had any right to the possession or occupancy of the land prior to the execution and delivery of the deed and the mortgages.

Eleventh.

The court erred in finding and adjudging that there was any duty on the part of The New Hampshire Savings Bank and P. J. Conklin, or either of them, to see to the application of the proceeds of the mortgage of The New Hampshire Savings Bank.

Twelfth.

The court erred in its finding that it was, in any way, contemplated by any of the parties that the proceeds of the Seventy-five Hundred ($7500.00) Dollar mortgage were to be used in building improvements on said Waco Avenue property.

Thirteenth.

The court erred in establishing the lien of the mechanic's lien claimant, G. F. Varner and W. E. Marshall, partners, doing business as The Wichita Lumber Company, as a first lien on the proceeds of said Waco Avenue property.

Fourteenth.

The court erred in allowing interest on the claim of said mechanic's lien claimant from October 22nd, 1912.

Fifteenth.

The court erred in allowing the said claim in full, without any abatement.

Sixteenth.

The court erred in allowing said money, to the amount
221 of said claimant's lien, to be withdrawn and erred in ordering the same to be paid to the claimant.

Seventeenth.

The court erred in permitting said money to be withdrawn and substituting a bond therefor.

Eighteenth.

The court erred in not considering all of the claims of the mechanic's lien claimants, who filed petitions for review from the decision of C. V. Ferguson, Referee, as one proceeding in bankruptcy and erred in rendering six (6) separate judgments in said proceeding.

Nineteenth.

The court erred in not consolidating the mechanic's lien claimants, who appealed from the Referee's decision, in one action or proceeding, and in not rendering one judgment in said action.

Wherefore, the said, The New Hampshire Savings Bank, and the said P. J. Conklin pray that the said decree be reversed

and that the lien of the said mechanic's lien holder, G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, upon the proceeds of the sale of the said Waco Avenue property be adjudged inferior to the liens of the said, The New Hampshire Savings Bank, and said P. J. Conklin thereon and that the court of appeals render a proper decree on the record.

THE NEW HAMPSHIRE SAVINGS BANK.
By Kos Harris & V. Harris, Its Solicitors.

P. J. CONKLIN,
By Holmes, Yankey & Holmes, His Solicitors.

Filed in the U. S. District Court Oct. 1, 1913.

In the Matter of Charles Bron, A Bankrupt.
222 In Bankruptcy No. 585.

Bond on Appeal in Bankruptcy.

Know All Men By These Presents, That The New Hampshire Savings Bank and P. J. Conklin, as principals, and Fred W. Little and Laura Conklin as sureties, are held and firmly bound unto G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, in the full sum of Five Hundred ($500.00) Dollars, to be paid to the said obligees, their heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Dated this 1st day of October, A. D. 1913.

Whereas, lately, at this the September Term of the District Court of the United States, for the District of Kansas and Second Division, in a matter depending in said court and in a controversy arising and growing out of the estate of Charles Bron, a bankrupt, a judgment was rendered by said court against the said principal obligors herein, The New Hampshire Savings Bank and P. J. Conklin, and in favor of the said obligees herein, wherein and whereby said court adjudged that the said obligees were entitled to a first and prior lien on the proceeds of the sale of certain property on Waco Avenue in the City of Wichita, Kansas, for the amount of their respective mechanic's liens against the said property and the funds arising from the sale thereof,
and adjudging and decreeing that the principal obligors
223 herein were junior lien holders to the said obligees herein.

And Whereas the said G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company had judgment in said court for the sum of Three Thousand One Hundred Forty-five and 81-100 ($3145.81) Dollars, and whereas The New Hampshire Savings Bank and P. J. Conklin have obtained and have been allowed, an appeal from said judgment and have been allowed said appeal in open court, at the same term at

which said judgment was rendered in favor of said G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company.

Now, the condition of the above and foregoing obligation is such that if the said, The New Hampshire Savings Bank, and P. J. Conklin shall prosecute said appeal to effect and answer all damages and costs, if they fail to make good their appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, Said principal obligors and sureties have signed the above and foregoing bond this 1st day of October, A. D. 1913.

THE NEW HAMPSHIRE SAVINGS BANK,
By Kos Harris & V. Harris, Its attorneys.

P. J. CONKLIN,
Holmes, Yankey & Holmes, Per H., His Attorneys.

FRED W. LITTLE,
LAURA CONKLIN.
Sureties.

The above and foregoing bond is absolutely good.
KOS HARRIS, Attorney.

The above bond approved this 1st day of October, 1913,
224 in the September term of said court.

JOHN C. POLLOCK,
Judge of the United States District Court aforesaid.

Affidavit of Sureties on Bond of The New Hampshire Savings Bank and P. J. Conklin, in the matter of the appeal of said parties.

Sedgwick County } ss.
State of Kansas }

Fred W. Little, as surety on the annexed undertaking, being first duly sworn, according to law, on oath says that he is worth Three Thousand ($3000) Dollars over and above all his just debts, exemptions and liabilities; and Laura Conklin as surety on said undertaking, being first duly sworn, according to law, on oath says that she is worth Three Thousand ($3000.00) Dollars over and above all of her just debts, exemptions and liabilities.

FRED W. LITTLE.
LAURA CONKLIN.

Subscribed in my presence and sworn to before me, the undersigned Notary Public, this 1st day of October, A. D. 1913.

(Seal) SYLVIA RHINEHART,
Notary Public Sedgwick County, Kansas.

My Commission expires Aug. 18, 1914.

Filed in the United States District Court Oct. 1, 1913.

225 In the Matter of Charles Bron, a Bankrupt.
In Bankruptcy No. 585.

Petition on Appeal of The New Hampshire Savings Bank and P. J. Conklin from the Judgment in favor of the Wichita Lumber Company.

To the Honorable John C. Pollock, District Judge.

Whereas, at the September term of the District Court of the United States for the District of Kansas and Second Division, held at the City of Wichita, Kansas, and judgment was rendered as hereinafter referred to on October 1st, A. D. 1913, in the above entitled cause and the said court by its judgment found and held in the above bankruptcy matter that G. F. Varner and W. E. Marshall partners as the Wichita Lumber Co. and other mechanic's lien holders were each and all separately entitled to a first, prior and equal amount by reason of their repsective mechanic's liens on the proceeds of the sale of certain property situate on Waco Street or Avenue in the City of Wichita, Kansas, as between the said Wichita Lumber Company and other Mechanic's lien holders on the one part, and The New Hampshire Savings Bank and P. J. Conklin on the other part and the court held that said Wichita Lumber Company and said mechanic's lien holders holding said mechanic's liens had an equal prorate lien on the proceeds of said property and the said judgment in favor of the said Wichita Lumber Company being a separate judgment and the court held that the said New Hampshire Savings Bank was not entitled to a prior lien on said property and that said P. J. Conklin was not entitled to a prior lien on said property, but entitled to a second lien and that
226 said P. J. Conklin was entitled to a third lien.

Therefore, the said New Hampshire Savings Bank and P. J. Conklin considering themselves aggrieved by said judgment of said court so made and entered on said date in favor of the said Wichita Lumber Company in the sum of Three Thousands One hundred forty-five & 81-100 ($3145 81-100 Dollars do now hereby on this 1st day of October, 1913, in open court in the same term appeal from the said judgment so rendered in favor of said Wichita Lumber Company to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified and set forth in the assignment of errors which is filed herewith and the said, The New Hampshire Savings Bank and P. J. Conklin pray that this appeal may be allowed, that a transcript of the record proceedings and papers upon which said judgment was made duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, and said New Hampshire Savings Bank and said P. J. Conklin herewith tender to the court a good and sufficient bond

for all costs and damages which they pray that the court may approve.

KOS HARRIS & V. HARRIS,
Solicitors for The New Hampshire Savings Bank aforesaid.

HOLMES, YANKEY & HOLMES,
Solicitors for P. J. Conklin, aforesaid.

Filed in the U. S. District Court Oct. 1, 1913.

In the Matter of Charles Bron, a Bankrupt.
227 In Bankruptcy, No. 585.

Order allowing appeal from judgment in favor of G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company.

Now, on this first day of October, A. D. 1913, at the September Term 1913 of the above court, this court reversed the order of the Referee in Bankruptcy and rendered a separate judgment in favor of G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, in the sum of Three Thousand One Hunderd Forty-five & 81-100 ($3145.81) Dollars, and also rendered judgment in favor of The Jackson-Walker Coal & Material Company, a corporation, The Home Builders Association, a corporation, J. C. Titus and J. H. Higley, partners as The Titus-Higley Lumber Company, A. S. Orr, doing business as The North End Hardware Company and The Haines Tile & Mantle Company, a corporation, mechanic's lien holders, for the amount of the respective liens of said mechanic's lien holders, all said judgments being rendered separately, whereby the said mechanic's lien holders, each, were adjudged and decreed to have a first, equal, pro rata lien on the funds arising from the sale of the property known as the Waco Avenue property in the estate of Charles Bron, a bankrupt, and adjudging and decreeing that The New Hampshire Savings Bank have a second lien on said funds and that P. J. Conklin have a third lien on said funds.

And Whereas, The New Hampshire Savings Bank and P. J. Conklin have each given notice of appeal in open court, at the same term of court at which the judgments were rendered, appealing from the said judgment rendered in favor of the
228 said G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, and have filed petitions on appeal in said matter and have filed their assignment of errors with the Clerk of this court.

It is, therefore, by the Court considered, ordered and adjudged that The New Hampshire Savings Bank and P. J. Conklin be, and they are hereby, granted and allowed a joint appeal from the said judgments so rendered, and the said, The New Hampshire Savings Bank, and said P. J. Conklin are required to execute a bond unto the said, G. F. Varner and W. E. Marshall,

partners doing business as The Wichita Lumber Company, in the sum of Five Hundred ($500.00) Dollars, conditioned that they shall prosecute their said appeal to effect and answer all damages and costs, if they fail to make good their appeal.

JOHN C. POLLOCK.
Judge of the United States District Court, aforesaid.

Filed in the U. S. District Court Oct. 1, 1913.

In the Matter of Charles Bron, a Bankrupt.
229 No. 172 Civil.
In Bankruptcy No. 585.

In the Matter of the Appeal of The New Hampshire Savings Bank and P. J. Conklin.

To the Clerk of the United States District Court:

You are directed to have the printer arrange the matters to be printed in the transcript in the appeals of The New Hampshire Savings Bank and P. J. Conklin vs. G. F. Varner and W. E. Marshall, partners as The Wichita Lumber Company, in the following order, to-wit:

1. The election filed by appellants to proceed under the Act of February 13, 1911, relating to appeals, which was filed October 15th, 1913.
2. Stipulation of counsel as to one record and one brief.
3. Precipe for transcript, filed in your office.
4. The matter designated in the precipe, filed in your office, for copy, relating to the certificate of C. V. Ferguson, in the matter of the priority of liens in the above proceeding.

4½. The evidence mentioned in the precipe upon which Judge Ferguson's decision was based.

5. Petition to revise, filed by Varner and Marshall.
6. Judge Pollock's memorandum decision.
7. Judge Pollock's final decree.
8. The assignment of errors.
9. The bond on appeal.
10. Petition for the appeal.
11. Order allowing the appeal.

KOS HARRIS & V. HARRIS,
R. L. HOLMES, CHAS. YANKEY &
W. E. HOLMES.
Attorneys for Appellants.

Filed in the U. S. District Court Oct. 30, 1913.

230 In the Matter of Charles Bron, A Bankrupt.
In Bankruptcy, No. 585.

In the Matter of the Appeals of
The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
G. F. Varner and W. E. Marshall, partners as The Wichita Lumber Company, Appellee, No. 172.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
The Jackson-Walker Coal & Material Co., Appellee, No. 176.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
The Titus-Higley Lumber Company, Appellee, No. 170.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
The Home Builders Association, Appellee, No. 177.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
A. S. Orr, doing business as The North End Hardware Company, Appellee, No. 173.

The New Hampshire Savings Bank and P. J. Conklin, Appellants,
vs.
The Haines Tile & Mantle Company, Appellee, No. 174.

Order Enlarging Time in Which to Prepare Record in the above six appeals.

It appears that the appeals were taken in the above proceedings on October 1st, 1913, and that the record for the said appeals, having been transcribed by the Clerk of this Court, is now in the hands of the printer for printing under the supervision of the Clerk.

231 And it appears that J. F. Shearman, Deputy Clerk in charge of the office at Wichita, has been called away suddenly on account of the serious illness of his son, and the date of his return is uncertain.

And it further appears that the said record and transcript cannot be vertified until the return of said J. F. Shearman.

It is, therefore, by the Court considered, ordered and adjudged that the time of the transmission of the record in the said appeals to the United States Circuit Court of Appeals at St. Louis, be enlarged until January 1st, 1914.

Done this 26th day of November, A. D. 1913.

JOHN C. POLLOCK.

Judge of District Court of United States, District of Kansas, Second Division.

Filed in the U. S. District Court Nov. 28, 1913.

United States of America, }
District of Kansas, } ss.

I, Morton Albaugh, Clerk of the District Court of the
232 United States, for the District of Kansas, do hereby certify that the foregoing printed pages, numbered from one to 139 inclusive, contain true, full and complete copies of such of the pleadings, proceedings, testimony, record and record entries in a certain suit in equity in the Second Division of said Court, No. 172 Civil, wherein The New Hampshire Savings Bank and P. J. Conklin are appellants and G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, are appellees, the same arising out of the matter of Charles Bron, a bankrupt, in Bankruptcy, No. 585, as were designated in writing by solicitors for the said appellants for this record, for the consideration of the United States Circuit Court of Appeals, for the Eighth Circuit, the same being as true, full and complete as the originals of the same, which now remain on file and of record in my office.

And I further certify that no Citation on Appeal or Writ of Error has been issued or filed in this suit.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at Wichita, Kansas in said District this 29th day of November, A. D. 1913.

MORTON ALBAUGH,
Clerk of the United States District Court, for the District of Kansas.

By J. F. Shearman,
Deputy Clerk.

(Seal)

(*Appearance of Counsel for Appellants in Cause No.* 4105.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4105.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants,
vs.
G. F. VARNER and W. E. MARSHALL, Partners as The Wichita Lumber Company.

The Clerk will enter my appearance as Counsel for the Appellants.

KOS HARRIS.
V. HARRIS.
R. L. HOLMES.
C. G. YANKEY,
Pr. K. H.
WINN HOLMES.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 9, 1913.

(*Appearance of Mr. Chester I. Long as Counsel for Appellees in Cause No.* 4105.)

The Clerk will enter my appearance as Counsel for the Appellees.
CHESTER I. LONG,
Wichita, Kansas.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 19, 1914.

(*Appearance of Messrs. Brubacher & Conly as Counsel for Appellees in Cause No.* 4105.)

The Clerk will enter my appearance as Counsel for the Appellees.
J. A. BRUBACHER, *Wichita, K's.*
J. A. CONLY. " "

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 21, 1914.

(*Appearance of Messrs. Brown & Brown as Counsel for Appellees in Cause No.* 4105.)

The Clerk will enter my appearance as Counsel for the Appellees.
PAUL BROWN.
SILAS S. BROWN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 28, 1914.

No. 4125.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants,
vs.
THE HOME BUILDERS ASSOCIATION, Appellee.

Appeals from the District Court of the United States for the District of Kansas in the Matter of Charles Bron, a Bankrupt.

Mr. Kos Harris and Mr. Charles G. Yankey (Mr. V. Harris, Mr. R. L. Holmes, and Mr. Winn Holmes with them on the briefs) for the appellants in each case.

Mr. J. A. Brubacher, and Mr. Chester I. Long (Mr. A. V. Roberts, Mr. Paul Brown, and Mr. George Gardner on the briefs) for appellees.

Before Sanborn and Carland, Circuit Judges, and Reed, District Judge.

The appellants, The New Hampshire Savings Bank, a New Hampshire corporation, as assignee of E. D. Kimball, and P. J. Conklin made proof before the proper referee in bankruptcy of separate debts against the bankrupt estate of Charles Bron, a bankrupt, in the sum of $8,312.50 and $5,218.00 respectively, and in the proofs alleged that their respective debts were secured by mortgages upon certain real estate of the bankrupt situated in the City of Wichita, Kansas, known as the Waco Avenue property in that city, and each asked that his debt be allowed in the sum claimed and as secured by his mortgage, and that mortgage adjudged the first or prior lien in the order thereof upon said real estate as security for said debts. The several appellees appeared before the referee and objected to the allowance of the appellants' mortgages as prior liens upon said property to secure such debts as against them; and alleged that they severally held mechanics' liens upon said property each of which under the statute of Kansas was prior to the liens of the appellants' mortgages, and asked that their respective mechanics' liens be adjudged liens upon the property prior to the liens of the mortgages; and the trustee in bankruptcy in behalf of the general creditors objected to the allowance of any liens upon the property. The referee heard the claims of the respective parties upon testimony in which there is sharp dispute as to the date of the execution of the deed of the property to the bankrupt, and of the execution and delivery of the appellants' mortgages, and the commencement of the improvement of the property, from which the several mechanics' liens date, and adjudged the liens of the appellants' mortgages to be valid and prior to the several mechanics' liens of the appellees; directed the property to be sold and the proceeds applied to the payment first, of the mortgage lien of the New Hampshire Savings Bank, second, to the mortgage lien of P. J. Conklin, and the remainder if any, to the mechanics' liens of the several appellees without priority as between them. Upon separate petitions of the appellees for review of such

order the district court reversed the order of the referee and decreed the several mechanics' liens to be prior in equity to the mechanics' liens of the appellants' and directed that the proceeds arising from the sale of the property be applied first: to the payment of those liens without priority as between them, and the remainder if any, to the payment first, of the mortgage lien of the New Hampshire Savings Bank, and second to the mortgage lien of P. J. Conklin (in accordance with the provisions of the Conklin mortgage) and that the appellants pay the costs of the proceedings. From this decree the appellants separately prosecute these appeals. The parties have stipulated in writing that the several appeals shall be submitted upon the same record and as one cause; that the amounts of the mortgages and mechanics' liens shall be as found by the referee, and that only the question of their priority shall be submitted to this court for determination.

REED, *District Judge*, delivered the opinion of the Court:

The appellants are confronted at the threshold of the proceeding with motions to dismiss their respective appeals upon the ground that their remedy, if any they have, is by petition to revise in matter of law under Sec. 24*b* of the Bankruptcy Act and not by appeal under Sec. 25*a*. The determination of this question is ruled by the decision of this court in Coder v. Arts, 152 Fed. 943, affirmed by the Supreme Court in 213 U. S. 223; the matter of Loving, 224 U. S. 183; In re Hartzell, 209 Fed. 775 (126 C. C. A. 499) this circuit; and see In re Streator Metal Stamping Co., 205 Fed. 280 (123 C. C. A. 444).

In Coder v. Arts, 213 U. S. above, it was insisted by the trustee, as it is by the appellees here, that inasmuch as no objection was made to the amount found due upon the notes by the District Court, and it was only sought by the appeal to further contest the right to the security asserted by the mortgagee Arts, that his remedy was under Sec. 24*b*, by petition to revise in matter of law and not by appeal; but it was held that the character of the proceedings must be determined by the nature of the claim set up against the bankrupt estate, and that appeal was the proper remedy to question the validity of a lien asserted as security for a debt of more than $500.

In re Hartzell, 209 Fed. 775, there was asserted in effect, by way of intervention in the bankruptcy proceedings a lien alone upon the property of the bankrupt, and it was held that an appeal in such case was also an appropriate remedy to review the decision of the court of bankruptcy denying such lien.

In the matter of Loving, 224 U. S. 183, a bank made proof of its debt against a bankrupt estate before the proper referee in bankruptcy, and in its proof asserted a lien under a statute of Kentucky upon certain property of the bankrupt estate, and asked that its debt be allowed as a claim secured by such lien. The claim was allowed by the referee as a lien against the estate of the bankrupt over the objection of Loving the trustee in bankruptcy, who petitioned the Court of Appeals to revise in matter of law the order

of the referee establishing the lien only. The Supreme Court held that the fact that after the adjudication of the claim the trustee made no further objection to its allowance, and contested only the validity of the lien did not change the appellate character of the proceedings, and that appeal was the appropriate remedy.

The establishing of liens upon real or personal property as security for adebt and determining the priority thereof are well recognized grounds of equity jurisdiction; and whether the assertion of a lien in bankruptcy proceedings be in connection with a claim for a debt which it is alleged it secures, or a lien only upon the property, an appropriate remedy for the review of the decisions of courts of bankruptcy, which proceed upon equitable principles, is appeal under Sec. 24*a* and 25*a* of the Bankruptcy Act.

The motion to dismiss the appeals upon the ground that they are not the proper remedy must therefore be denied.

The appellees in Nos. 4121, 4122 and 4125 separately move to dismiss the appeals upon the further ground that the mechanics' lien in each of those cases is less than $500 (as they in fact are), and that the appeals should be dismissed for that reason. But it is the decree adjudging the appellants' liens to be inferior to those of the several appellees that is sought to be reviewed, and it is the amount of the appellants' liens respectively that determines their right to appeal, and not the amount of the several liens of the appellees. These motions to dismiss the appeals must also be denied.

Sec. 6244 of the General Statutes of Kansas (1909) provides:

"Any person who shall under contract with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon; or who shall furnish material or perform labor in putting up of any fixtures or machinery in, or attachment to any such building, structure, or improvement; * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for such labor, material, fixtures or machinery. Such liens shall be preferred to all other liens or incumbrances, which may attach to or upon said land, buildings or improvements, or either of them, subsequent to the commencement of such building * * * or improvements."

It is held by the Supreme Court of Kansas that this statute gives to the material man or laborer for material furnished or labor done in constructing buildings or improvements upon the land of another, a lien for such material and labor prior to all liens or incumbrances upon the property that may attach subsequent to the commencement of the work upon the building or improvement, or the furnishing of fixtures, machinery or repairs where the lien is claimed for fixtures, machinery or repairs: Kansas Mortgage Co. v. Weverhaeuser, 48 Kan. 335 (29 Pac. 153); Nixon v. Cydon Lodge, 56 Kan. 298 (43 Pac. 236), and cases cited. Whether or not any of the several mechanics' liens in question are for fixtures or machinery furnished for this building does not definitely appear. As the building was

an entirely new structure it may be assumed that the liens are all for material used in its construction. Three questions then arise, (1) when did the bankrupt acquire title to this property; (2) when did the appellants' mortgage liens attach thereto; and (3) when was the work of constructing the building actually commenced? From the testimony taken by the referee and certified by him to the district court upon the petitions for review, it appears without dispute that on and prior to January 1, 1911, Mrs. Conklin, wife of the appellant Conklin, was the owner of the property and occupied it with him as a part of their homestead; that the bankrupt had some negotiation with the appellant Conklin for its purchase shortly prior to that date which was consummated by a deed from Mrs. Conklin and her husband to the bankrupt delivered January 4, 1911, but bearing date December 31, 1910. During these negotiations it was especially agreed verbally that the bankrupt was to execute a purchase money mortgage to the appellant Conklin for $4,500, and one to a Mr. Kimball for $7,500 (The New Hampshire Savings Bank mortgage), which was for borrowed money presumably to enable the bankrupt in part at least to improve the property; that these mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt, and be the first or prior liens upon the property, the Kimball mortgage to be prior to that of Conklin; that the mortgages were so executed by the bankrupt and wife and delivered when the deed to the bankrupt was delivered, as one transaction, and all were filed for record in the office of the proper register of deeds, January 4, 1911, about noon of that day; the Kimball mortgage being marked filed a few minutes prior to the Conklin mortgage. There was no agreement or understanding that the bankrupt should have possession or the right of possession of the property before the deed and mortgages were executed and delivered; in fact the agreement was that there should be no work done upon the premises until the transaction was completed and the deed and mortgages filed for record. It is the contention of the appellees that the deed to Bron was delivered on January 3rd; but the great weight of the testimony convinces that the deed was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4th, and that it was not delivered until that morning there is no doubt under the testimony. Under these facts neither the title to the property, nor the right of possession vested in the bankrupt until January 4, 1911, and no valid mechanics' lien could attach to the property under any contract with the bankrupt prior to that time; and the appellants' mortgage liens attached simultaneous with the vesting of the title in the bankrupt, and were therefore the prior liens upon the property. Huff v. Jolly, 41 Kans. 537 (21 Pac. 646); Chicago Lumber Co. v. Schweiter, 45 Kans. 207 (25 Pac. 592); Getto v. Friend, 46 Kans. 24 (26 Pac. 473); Missouri Valley Lumber Co. v. Reid, 45 Pac. 722 (4 Kans. App. 41). See also Hayes v. Fessenden, 106 Mass. 230; Conrad v. Starr, 50 Iowa 470, 479, 482; Wagar v. Briscoe, 38 Mich. 587, 592, 593.

In Chicago Lumber Co. v. Schweiter, 45 Kans. 207 above, the Supreme Court of Kansas said:

"To create a valid lien for material or labor, it is necessary that the person for whom they are furnished should be an owner within the meaning of the statute, and have a right at the time the contract for the same is made to create a lien. The only claim which Jones had upon the land was derived from his contract with the owner, and any one who relies on the contract to establish ownership in Jones must be governed by the limitations and conditions therein contained. When the lumber and material was purchased and furnished, Jones did not have the legal title, and by the terms of the contract which he made he did not have the equitable title, and he could create a lien on no greater interest than he held. 'In general, it must be said that only the interest of the contracting party can be subjected to the lien, and, if he has no interest, there is nothing to which the lien can attach.' 2 Jones, Liens § 1245; Wagar v. Briscoe, 38 Mich. 587; Hayes v. Fessenden, 106 Mass. 230. If the lumber company had examined the public records when the material was sold and delivered, it would have ascertained that the legal title was in Schweiter; and if they had pursued the inquiry, as they should have done, they would have learned of the contract between Jones and Schweiter, with all of its conditions and limitations."

The appellees contend that the work of excavating for the cellar of a building to be erected upon the premises, was begun early in the morning of January 3, 1911, and continued during January 4th and for some days thereafter, and that such beginning was under the Kansas decisions the commencement of work upon the building. If that is true then a contract for such excavation was made before the bankrupt acquired any title to or right of possession of the property, and was not with the owner thereof; and liens arising upon work done under such contract would attach only to the interest the bankrupt then had in the property and would not take precedence over the appellants' mortgages, which vested simultaneously with the vesting of the title in the bankrupt. The appellees' contention as to the commencement of this excavation rests upon the testimony of Charles Bron, Jr., son of the bankrupt, who testified that between Christmas, 1910, and January 1, 1911, he arranged with a Mr. Underwood and a Mr. Jones to clear the premises and do the work of excavating for the cellar of the building known as the Waco flats that his father was to erect upon the premises in question; that in the afternoon or evening of January 2nd (which was Monday) he saw Mr. Underwood and told him he wanted to commence the work of excavating the next morning, and for him to be there early and he would meet him on the premises; that Mr. Underwood came shortly after eight o'clock the morning of January 3rd, that he (Bron, Jr.) then staked out lines for the cellar and Underwood took away two loads of dirt; that the weather was so cold and the ground frozen so hard that they had to quit work and did nothing more that day; that the next morning, January 4th, Mr. Jones came and they continued the excavation during that

day and subsequent days until it was completed. As a reason for commencing this work on January 3rd he said that it was a practice he had adopted some two or three years before of having work commenced on the construction of buildings before mortgage liens were filed thereon; that his father was engaged in building upon unimproved property, and was unable to obtain lumber or building materials on credit unless work was commenced for a building before mortgage liens were filed thereon.

Mr. Underwood testified that he was told by Mr. Bron, Jr., the afternoon of January 2nd that he wanted him to commence the work of excavating for the cellar early the next morning; that he went there shortly after eight o'clock and found Mr. Bron, Jr., upon the premises who staked out lines for the cellar; that the weather was so cold and the ground frozen so hard that they could do but little work; that he succeeded in getting one small load with a pick and shovel and part of another along one side of the cellar line and hauled them away and quit work; that the next day was also cold but not as cold as the day before, and they continued the work. Mr. Jones testified that he went there on January 4th and worked with Underwood in excavating for the cellar; that he was sick the next day but sent his boy in his stead. Mr. and Mrs. Conklin who lived upon the premises and in full view of where the excavating is alleged to have been done, testified positively that no work was done in excavating for the cellar on January 3rd or 4th. That January 3rd was so cold that Mrs. Conklin could not go out to complete the execution of the deed of the property to the bankrupt. Others living near the property testified that they saw no evidence of work done upon the premises on January 3rd or 4th, nor was any done until some days after January 4th.

In certifying the evidence to the Judge upon the petition for review the referee says:

"At an early hour of January 3, 1911, Bron entered upon the premises with laborers and did an hour or two's work toward excavating for the foundation of a building which was to be erected on the premises. Soon after this various parties furnished labor and material in and about the erection of improvements, for which they filed mechanics' liens, presented herein as secured claims; that in the course of the proceedings in said case the following questions arose: Which of the respective claimants was entitled to the first, second and third lien on the funds? and it was determined that the lien created by the mortgage from Bron to Kimball and assigned to the New Hampshire Savings Bank vested immediately upon its execution, delivery and record, and was a first lien on the premises; and the mortgage to Conklin, by agreement between the parties, created a lien upon its execution, delivery and record and was a second lien on the premises; and the creditors having mechanics' liens, which were co-equal, were entitled to a third lien without preference to any one of them, their liens not having precedence over the mortgages, the actual beginning of the building not having commenced until after the third day of January, 1911, the work done by the bankrupt on that day being fraudulently done by the

bankrupt for the purpose of giving preference over the mortgages to mechanics' liens to be thereafter created and established. * * *"

It is true that under the Kansas statute as construed by the Supreme Court of that state, mechanics' liens date from the commencement of the building or improvement. Thomas v. Mowers, 27 Kans. 265; Chicago Lumber Co. v. Schweiter; Getto v. Friend, above, and Kansas Mortgage Co. v. Weyerhaeuser, 48 Kans. 335 (29 Pac. 153). This, of course, means a commencement of the building in good faith and not a mere pretense at commencement to defeat prior liens upon the property.

In Kansas Mortgage Co. v. Weyerhaeuser, above, the question of what constitutes "the commencement of a building" is considered, and after quoting from a number of cases the court says:

"The commencement of a building in law, takes place with the digging and walling of the cellar. It is some work or labor on the ground, such as beginning to dig the foundation, which every one can readily see and recognize as the commencement of a building. In the cases of Kelly v. Rosenstock, and Kugler v. Same, 45 Md. 389, it was held that a lessee, before he had acquired an interest in the property, and before a survey had been made, went with his foreman and a laborer, and drove stakes to indicate the line of the foundations, and at one corner dug or scraped away the dirt down to a level, the whole work occupying but a part of a day, that this could not be considered as the commencement of the building. In the case of Savings Bank v. Fellows, 42 Conn. 36, it is held that bringing a considerable amount of lumber upon the premises, and beginning to build a fence around the lot, does not create a lien prior to a mortgage executed after the delivery of the lumber, or the commencement of the fence, the work on the house not commencing until after the execution of the mortgage. These citations (including Conrad v. Starr, 50 Iowa 479, and others) are enough to show the drift of judicial opinion upon this question. As the avowed object and main purpose is to create an impression on the mind of any person who seeks to purchase or acquire an interest or lien in the land, the acts indicating that a building thereon is being commenced ought to consist of work of such character that a person of ordinary observation could determine that a building was in process of construction."

From this decision and the cases therein cited it seems clear that the work done by the bankrupt's son and Underwood on the premises on the morning of January 3rd, conceding for the moment that such work was done that morning or the morning of January 4th; was not such work as amounted to the commencement of the building within the meaning of the Kansas statute; and when it is considered that it was done, as stated by the bankrupt's son, to defeat the liens of the prior mortgages it is entirely clear that what was done was but a mere pretense at the commencement of a building, done to defeat bona fide prior liens upon the property.

The work of Underwood and Jones in excavating for the cellar, whatever was done, was paid for by the bankrupt when done and no lien was filed therefor. When the material of the several appellees

was contracted for or furnished for the building is not shown by the record other than the referee states in his certificate that it was sometime after January 4, 1911. There can be no doubt under the testimony that if they had then examined the record title to this property, as it was their duty to do, if they relied upon a lien thereon as security for the material (Chicago Lumber Co. v. Schweiter, 45 Kans. 207, above) they would have discovered that appellants' mortgages were executed and filed for record at the same time the deed to the bankrupt was executed and as a part of one transaction and were prior liens upon the property.

It is also claimed that Underwood cleaned the premises of some shrubbery and a few trees during the holidays; but such work if done is no indication of the beginning of a building. Kansas Mortgage Co. v. Weyerhaeuser, above.

The appellees cite and rely upon Smith Lumber Company v. Arnold, 88 Kans. 465 and cases cited (129 Pac. 178). In these cases the builder was either in actual possession of the property under an agreement for such possession, or the owner knew of such possession and that a building was being erected and made no objection thereto. In Chicago Lumber Co. v. Fretz, 51 Kans. 134 (32 Pac. 908) one of the cases cited in behalf of the appellees, the mortgagee and mechanics' lien holder both claimed under Fretz who was in actual possession of the property when the mortgage and mechanics' lien attached. In this case there was no such agreement, nor was Bron in actual possession of the property, and neither appellant knew that any work was done upon the premises preparatory to a building prior to the delivery of the deed and mortgage and the filing of the same for record, and no facts are shown which estop either of the appellants from enforcing his mortgage lien upon the property as against the several appellees.

The district court erred in adjudging the mechanics' liens to be prior to the appellants' mortgages, and its decree is reversed and the cause remanded to that court with directions to allow each of the appellants' mortgages as prior liens upon the property in the order thereof, and superior to the mechanics' liens of the several appellees. It is ordered accordingly.

Filed August 29, 1914.

(*Motion of Appellees Requesting Court to Make Finding of the Facts and Its Conclusions of Law thereon, Stated Separately, in Cause No. 4105.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 4105.

THE NEW HAMPSHIRE SAVINGS BANK et al., Appellants,
vs.
VARNER & MARSHALL, Doing Business as the Wichita Lumber Company, Appellees.

Motion.

Come now the appellees in the above entitled cause, before the entry of the court's decree herein, and move the court to make and file in this cause its finding of the facts and its conclusions of law thereon, stated separately, in accordance with General Order in Bankruptcy No. 36.

J. A. BRUBAKER,
PAUL BROWN AND
CHESTER I. LONG,
Solicitors for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1914.

September Term, 1914.

(*Order Denying Motion for Findings of Fact and Conclusions of Law in Cause No. 4105.*)

MONDAY, September 7, 1914.

This cause came on to be heard upon the motion of the appellees for a finding of facts and conclusions of law by this Court, prior to the entry of the decree herein, and was submitted to the Court without argument.

On consideration whereof, it is now here ordered by this Court, that said motion be, and the same is hereby, denied, upon the authority of Knapp v. Milwaukee Trust Co., 216 U. S. 545; Century Savings Bank v. Moody, et al., 209 Fed. 775, and Baker Ice Machine Co. v. Bailey, Trustee, 209 Fed. 844.

September 7, 1914.

(*Decree in Cause No.* 4105.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1914.

No. 4105.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants,
vs.
G. F. VARNER and W. E. MARSHALL, Partners, Doing Business as The Wichita Lumber Company.

Appeal from the District Court of the United States for the District of Kansas.

MONDAY, September 7, 1914.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby reversed with costs; and that The New Hampshire Savings Bank and P. J. Conklin have and recover against G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company the sum of — Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to allow each of the appellants' mortgages as prior liens upon the property in the order thereof, and superior to the mechanics' liens of the several appellees. The motion to dismiss this appeal is denied.

September 7, 1914.

(*Petition of Varner and Marshall, etc., for Appeal and Order Allowing Appeal to Supreme Court U. S. in Cause No.* 4105.)

The above named appellees, G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company, respectfully show:

That the above entitled cause is now pending in the United States Circuit Court of Appeals, Eighth Circuit, and that a decree was therein rendered on the 7th day of September, 1914, reversing the decree of the District Court of the United States for the District of Kansas, Second Division, and that the matter in controversy in said suit exceeds $1,000.00 besides costs; that this cause is one in which the United States Circuit Court of Appeals, Eighth Circuit, has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellees pray that an appeal be allowed them

in the above entitled cause, directing the Clerk of the Circuit Court of Appeals, Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellees may be reviewed, and if any errors be found, corrected according to the laws and customs of the United States.

J. A. BRUBACHER,
GEORGE GARDNER, AND
CHESTER I. LONG,
Solicitors for Appellees.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed, as prayed.

WALTER H. SANBORN,
Presiding United States Circuit Judge,
Eighth Circuit.

Dated October 5, 1914.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1914.

(*Assignment of Errors on Appeal of Varner and Marshall to Supreme Court U. S. in Cause No.* 4105.)

The above named G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company, in connection with the petition for appeal herein, present and file herein their assignment of errors, as to which matters and things they say that the decree entered herein on the 7th day of September, A. D. 1914, is erroneous, to-wit:

I.

The court erred in deciding and holding that the mortgages of the New Hampshire Savings Bank and P. J. Conklin were prior liens upon the property in question, and superior to the mechanics' lien of G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company.

II.

The court erred in reversing the judgment and decree of the District Court which adjudged and held the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to be prior to the mortgages of The New Hampshire Savings Bank and P. J. Conklin.

III.

The court erred in holding that the deed to the bankrupt was not completed by the acknowledgment of Mrs. Conklin until the

morning of January 4, 1911, and that the right of possession did not vest in the bankrupt until January 4, 1911, for the reason that by stipulation of the parties filed in the cause (Transcript of Record p. 12) it was agreed and admitted that Mrs. Conklin acknowledged the deed January 3rd, and for the further reason that the Referee in Bankruptcy and the District Court found that the property in question was conveyed to the bankrupt on January 3, 1911, while by stipulation of all of the parties it was agreed and admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were acknowledged on January 4th and filed for record after noon on that day.

IV.

The court erred in holding that the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin attached simultaneously with the vesting of the legal title and that the legal title vested in the bankrupt on January 4, 1911, and were prior to the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, for the reason that the Referee in Bankruptcy and the District Court found that the property was conveyed to the bankrupt on January 3, 1911, and by stipulation of all parties hereto it is admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were not recorded until after noon of January 4, 1911.

V.

The court erred in holding that the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, was not a first and prior lien on the improvements put upon the real estate by them, independent of the real estate without the improvements.

VI.

The court erred in holding that the vesting of title in the bankrupt and the attaching of the mortgage liens were simultaneous acts and that therefore the mortgage liens were prior to the mechanics' liens, for the reason that the court found that the deed was delivered in the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement, and the liens of the mortgages did not attach until after noon on the same day

VII.

The court erred in holding that the vesting of the legal title in the bankrupt and the attaching of the mortgage liens were simultaneous acts and that therefore the mortgage liens were prior to the mechanics' lien, for the reason that the alleged agreement between the bankrupt and P. J. Conklin that the delivery of the deed and the execution and recording of the mortgages were to be part of one

transaction was not shown to be in writing as required by Section 3838 of the General Statutes of Kansas, 1909, then in full force and effect, and therefore such agreement, if any, was null and void.

VIII.

The court erred in holding that the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, was inferior to the mortgage lien of The New Hampshire Savings Bank, for the reason that the said mechanics' lien attached to the legal and equitable estate of the bankrupt prior to the recording of the mortgage of the said The New Hampshire Savings Bank after noon of January 4, 1911.

IX.

The Court erred in holding that the vesting of the title in the bankrupt through the delivery of the deed from P. J. Conklin and wife, and the attaching of the mortgage lien of The New Hampshire Savings Bank were simultaneous acts, and that therefore the said mortgage lien was prior to the mechanics' lien of G. F. Varner and W. E. Marshall, for the reason that the court found that the deed was delivered during the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement and the mortgage lien of The New Hampshire Savings Bank did not attach until after noon on the same day.

X.

The court erred in holding that the work done by the bankrupt on the morning of January 3rd and the morning of January 4th in excavating for the foundation of the building was not such work as amounted to the commencement of the building, for the reason that the intent or purpose with which the bankrupt did the excavating could not affect, defeat or postpone the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, they not being required under the Kansas mechanics' lien law to ascertain the intent which actuated the owner in commencing the improvement.

XI.

The court erred in holding that the intent and purpose with which the bankrupt began the excavation for the building on January 3rd and the morning of January 4th, 1911, subordinated the mechanics' lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin, whose mortgages were not filed for record until after noon of January 4, 1911, the intent of the owner in commencing the improvement not being material in this controversy between lien holders.

XII.

The court erred in holding that as to P. J. Conklin and the assignor of The New Hampshire Savings Bank, E. D. Kimball, the work done by the bankrupt's son and Underwood on the premises on the morning of January 3rd and the morning of January 4th, 1911, and prior to the execution and recording of the said mortgages, was not such work as amounted to the commencement of the building within the meaning of the Kansas statute, for the reason that both said P. J. Conklin and E. D. Kimball knew at said time that a building was to be erected upon the premises, and said Conklin had agreed to convey said property to the knowledge of said Kimball with that object in view.

Wherefore, G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company, pray that said judgment and decree of said Circuit Court of Appeals may be reversed and the decree of the United States District Court for the District of Kansas, Second Division, be affirmed.

J. A. BRUBACHER,
GEORGE GARDNER, AND
CHESTER I. LONG,
Solicitors for G. F. Varner and W. E. Marshall, Doing Business as Wichita Lumber Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1914.

(Bond on Appeal of Varner and Marshall, etc., to Supreme Court U. S. in Cause No. 4105.)

Know all men by these presents:

That we, G. F. Varner and W. E. Marshall, partners, doing business as Wichita Lumber Company, as principals, and W. E. Haines as surety, are held and firmly bound unto The New Hampshire Savings Bank and P. J. Conklin, in the full and just sum of five hundred dollars ($500), to be paid to the said The New Hampshire Savings Bank and P. J. Conklin, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 25th day of September, A. D. 1914.

Whereas, lately at the May term, A. D. 1914, of the United States Circuit Court of Appeals, Eighth Circuit, in a suit pending in said court between The New Hampshire Savings Bank and P. J. Conklin, appellants, and G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company, appellees, an order and decree was rendered against the said G. F. Varner and W. E. Marshall, partners, doing business as Wichita Lumber Company, and the said G. F. Varner and W. E. Marshall, partners, doing business as Wichita Lumber Company, have obtained an appeal to the Supreme Court of the United States to reverse the order and decree rendered and entered in said cause.

Now the condition of the above obligation is such, that if the said G. F. Varner and W. E. Marshall, partners, doing business as Wichita Lumber Company, shall prosecute said appeal to effect and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

G. F. VARNER AND
W. E. MARSHALL,
Doing Business as Wichita umber Co.,
By W. E. MARSHALL.
W. E. HAINES.

STATE OF KANSAS,
County of Sedgwick, ss:

W. E. Haines surety named in the foregoing bond, being first duly sworn, says:

That he is a resident and freeholder in the county of Sedgwick, state of Kansas, and is worth the sum of one thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. E. HAINES.

Subscribed and sworn to before me this 25th day of September, A. D. 1914.

[SEAL.]

A. M. COWAN,
Notary Public within and for the County of Sedgwick and State of Kansas.

My commission expires Oct. 16-1915.

The foregoing bond is approved this 5th day of October, A. D. 1914.

WALTER H. SANBORN,
United States Circuit Judge,
Eighth Circuit, Presiding.

The above and foregoing bond is absolutely good.

CHESTER I. LONG, *Solicitor.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1914.

(Stipulation as to Hearing and Trial in Supreme Court of the United States.)

In the Supreme Court of the United States, October Term, 1914.

No. 4105.

G. F. VARNER and W. E. MARSHALL, Partners, Doing Business as Wichita Lumber Company, Appellants,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

No. 4123.

THE HAINES TILE & MANTEL COMPANY, Appellant,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

No. 4124.

THE JACKSON-WALKER COAL & MATERIAL COMPANY, Appellant,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

Stipulation.

The above named appellants, G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company; The Haines Tile & Mantel Company, and The Jackson-Walker Coal & Material Company, by their solicitors, J. A. Brubacher, George Gardner and Chester I. Long, and the above named appellees, The New Hampshire Savings Bank by Kos Harris and V. Harris, its solicitors, and P. J. Conklin by R. L. Holmes, Charles G. Yankey and W. E. Holmes, his solicitors, being all of the solicitors of the appellants and appellees in the above matters, stipulate for the trial and hearing in the Supreme Court of the United States, of the above causes, in case there be any trial and hearing therein, as follows, to-wit:

That the appellants herein may make one record in the Supreme Court of the United States, which record with any corrections or amendments thereto suggested by appellees, shall constitute the record in all the three appeals, and in any other proceedings had in any of these controversies, appellants may serve on solicitors for appellees one brief in all three appeals, and the appellees may serve one brief on solicitors for appellants, and said appeals shall be submitted to the Supreme Court of the United States for hearing together on said one record with any corrections or amendments as aforesaid; provided, that any or either of said appellees may sepa-

rately or jointly move to dismiss said appeals or any of them for want of jurisdiction, or on any other ground; said motion or motions may be heard at any time that may suit the convenience of the court, and this stipulation is not intended and shall in no wise be construed as a waiver by appellees of any rights whatever herein except as to making only one record as corrected or amended as aforesaid and only one brief as herein set forth.

Consent is hereby given for the Supreme Court of the United States or any justice thereof to make such orders pursuant to this stipulation as to the court or such justice may seem proper in the premises, due notice of such orders to be given to the appellees and appellants after the same are made.

Dated at Wichita, Kansas, September 25th, 1914.

G. F. VARNER AND
W. E. MARSHALL,
Partners doing Business as Wichita Lumber Company.
THE HAINES TILE & MANTEL COMPANY.
THE JACKSON-WALKER COAL & MATERIAL COMPANY,
By J. A. BRUBACHER,
GEORGE GARDNER AND
CHESTER I. LONG,
Their Solicitors.
THE NEW HAMPSHIRE SAVINGS BANK,
By KOS HARRIS &
V. HARRIS,
Its Solicitors.
P. J. CONKLIN.
By R. L. HOLMES,
C. G. YANKEY,
W. E. HOLMES,
His Solicitors.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 7, 1914.

(*Præcipe for Transcript on Appeal to Supreme Court U. S.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 4105.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants.
vs.
G. F. VARNER and W. E. MARSHALL, Partners, Doing Business as The Wichita Lumber Company, Appellees.

No. 4123.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants.
vs.
THE HAINES TILE & MANTEL COMPANY, Appellees.

No. 4124.

THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellants.
vs.
THE JACKSON-WALKER COAL & MATERIAL COMPANY, Appellees.

Præcipe.

To Honorable John D. Jordan, Clerk of said Court:

In preparing the trnascript upon the appeals allowed in these causes to the Supreme Court of the United States, in accordance with the stipulation filed herein, and Section 2 of the Act of February 13, 1911, entitled "An Act to Diminish the expense of Proceedings on Appeal and Writ of Error or Certiorari," you are directed by G. F. Varner and W. E. Marshall, doing business at Wichita Lumber Company, the Haines Tile and Mantel Company, and The Jackson-Walker Coal & Material Co. to incorporate into such transcript on such appeals the following portions of the record:

1. The printed transcript of record filed in the Circuit Court of Appeals, Eighth Circuit.

2. Also have printed and bound with printed record mentioned above, all proceedings in the Circuit Court of Appeals including the opinion of the court, the request of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, The Haines Tile & Mantel Company and The Jackson-Walker Coal & Material Company for findings of fact and conclusions of law under General Order in Bankruptcy No. 36, and the orders of the court denying such requests.

3. The stipulation filed herein in regard to the preparation of one record in the Supreme Court of the United States.

4. The citations, appeal bonds, assignment of errors, petitions for allowance of appeals, and orders granting the same, in all three causes.

J. A. BRUBAKER,
GEORGE GARDNER AND
CHESTER I. LONG,
Solicitors for G. F. Varner and W. E. Marshall, Doing Business as Wichita Lumber Co., The Haines Tile & Mantel Co., and The Jackson-Walker Coal & Material Company.

Due service of a copy of the above præcipe is hereby acknowledged this 28 day of Sept. A. D. 1914.

KOS HARRIS & V. HARRIS,
Solicitors for The New Hampshire Savings Bank.
R. L. HOLMES,
CHAS. G. YANKEY,
W. E. HOLMES,
Solicitors for P. J. Conklin.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 7, 1914.

THE UNITED STATES OF AMERICA:

To The New Hampshire Savings Bank and P. J. Conklin:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, within thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company, are appellants, and you are appellees, to show cause, if any there be, why the decree should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 5th day of October, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge United States Circuit Court of Appeals, Eighth Circuit

Service of a copy of the within citation is hereby admitted this 10 day of Oct., A. D. 1914.

KOS HARRIS &
V. HARRIS,
SAM'L C. EASTMAN,
Solicitors for The New Hampshire Savings Bank.
R. L. HOLMES,
CHAS. G. YANKEY,
W. E. HOLMES,
SAMUEL C. EASTMAN,
Solicitors for P. J. Conklin.

[Endorsed:] No. 4105. The New Hampshire Savings Bank et al., Appellants, vs. G. F. Varner and W. E. Marshall, etc. Citation on Appeal of Varner and Marshall to Supreme Court, U. S. Filed Oct. 12, 1914. John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing pages, being pages 1 to 169, inclusive, contain the transcript of the record from the District Court of the United States for the District of Kansas as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, as called for in the præcipe filed by counsel for appellees, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein The New Hampshire Savings Bank and P. J. Conklin are Appellants and G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company are Appellees, No. 4105, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with admission of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of October, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

In the Supreme Court of the United States.

Term No. 661.

GEORGE F. VARNER and W. E. MARSHALL, Doing Business as Wichita Lumber Company, Appellants,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

Term No. 662.

THE HAINES TILE & MANTEL COMPANY, Appellant,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

Term No. 663.

THE JACKSON-WALKER COAL & MATERIAL COMPANY, Appellant,
vs.
THE NEW HAMPSHIRE SAVINGS BANK and P. J. CONKLIN, Appellees.

Stipulation.

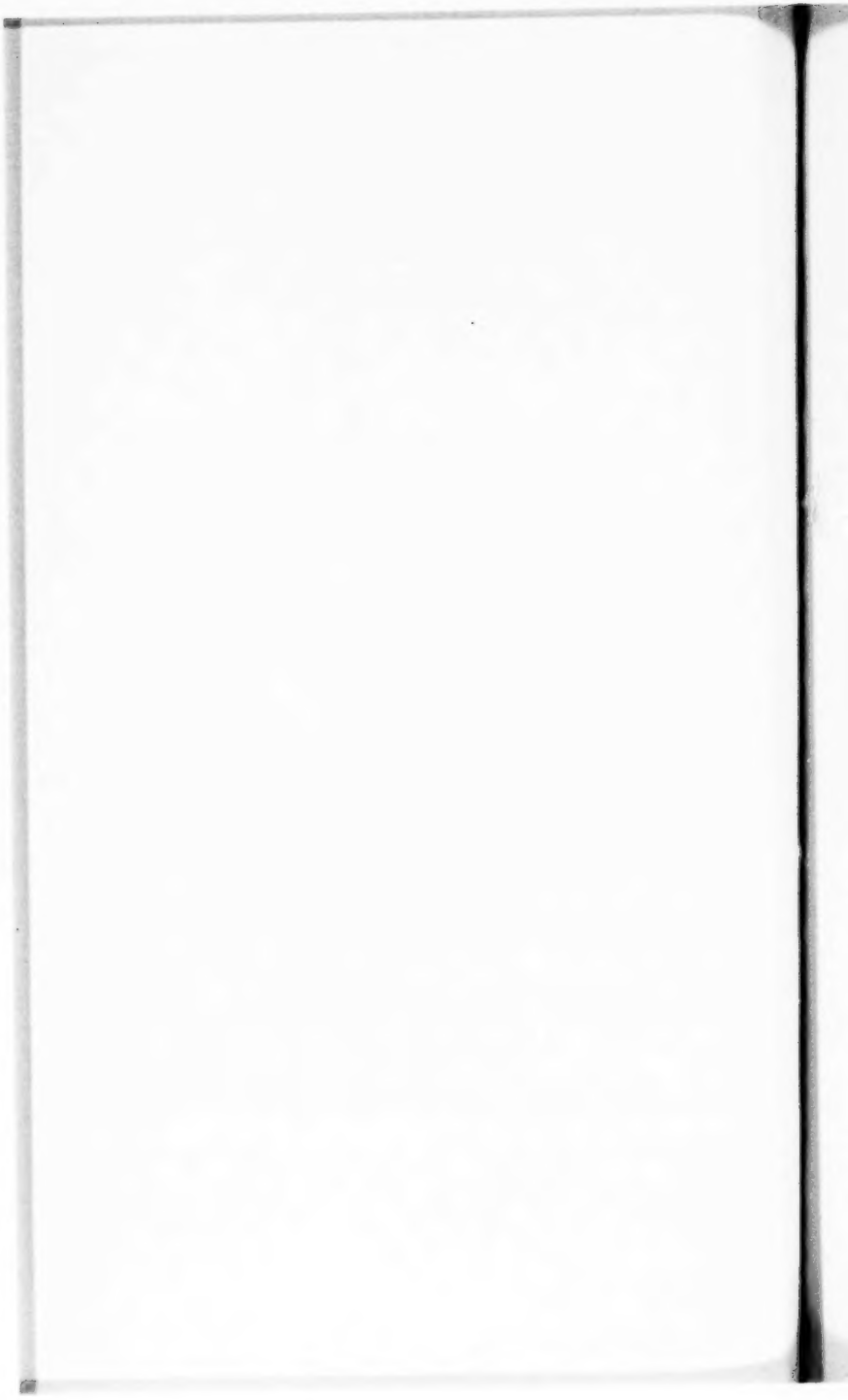
It is hereby stipulated and agreed between the parties in the above entitled causes that the Clerk of this Court in printing the record filed October 19, 1914, shall only print that part of the record which is contained between pages one (1) and one hundred seventy (170), inclusive, and which has not been printed in the United States Circuit Court of Appeals for the Eighth Circuit, and the Clerk shall omit, and shall not print pages one hundred seventy-one (171) to two hundred nineteen (219), inclusive, of said record. That part of the record which is to be printed under this stipulation shall be bound with the printed transcripts of the record that have been filed in the office of the Clerk of the Supreme Court.

CHESTER I. LONG,
GEORGE GARDNER,
J. A. BRUBACHER,
Solicitors for Appellants.
SAML C. EASTMAN,
By KOS HARRIS,
KOS HARRIS &
V. HARRIS,
R. L. HOLMES,
CHAS. G. YANKEY,
W. E. HOLMES,
Solicitors for Appellees.

[Endorsed:] 24,405, &c. Term Nos. 661, 662, 663. In the Supreme Court of the United States. Geo. F. Varner and W. E. Marshall, etc., Appellants, vs. The New Hampshire Savings Bank and P. J. Conklin, Appellees. The Haines Tile & Mantel Co., Appellant, vs. The Newhampshire Savings Bank and P. J. Conklin, Appellees. The Jackson-Walker Coal & Material Co., Appellant, vs. The New Hampshire Savings Bank and P. J. Conklin, Appellees. Stipulation.

[Endorsed:] File Nos. 24,405, 24,406 and 24,407. Supreme Court U. S. October term, 1914. Term Nos. 661, 662 & 663. G. F. Varner et al., Appellants, vs. The New Hampshire Savings Bank et al. The Haines Tile & Mantel Co., Appellant, vs. The New Hampshire Savings Bank et al. The Jackson-Walker Coal & Material Co., Appellant, vs. The New Hampshire Savings Bank et al. Stipulation as to printing of record. Filed November 14, 1914.

Endorsed on cover: File No. 24,405. U. S. Circuit Court Appeals, 8th Circuit. Term No. 661. G. F. Varner and W. E. Marshall, partners doing business as The Wichita Lumber Company, Appellants, vs. The New Hampshire Savings Bank and P. J. Conklin. File No. 24,406. Term No. 662. The Haines Tile & Mantel Company, Appellant, vs. The New Hampshire Savings Bank and P. J. Conklin. File No. 24,407. Term No. 663. The Jackson-Walker Coal & Material Company, Appellant, vs. The New Hampshire Savings Bank and P. J. Conklin. Filed October 19th, 1914. File Nos. 24,405; 24,406; 24,407.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 264.

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, APPELLANTS,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265.

THE HAINES TILE AND MANTEL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 266.

THE JACKSON-WALKER COAL AND MATERIAL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS.

If the alleged agreement between Bron and Conklin not to do any work on the building until after the mortgage was

recorded is not binding on appellants, then their mechanic liens are prior to the mortgages on one of three theories:

First.

The building was commenced before the mortgages were recorded, and they have prior liens on the legal estate of Bron in the property, under the authority of Meyer Brothers Drug Company *vs.* Brown, 46 Kansas, 543, cited on page 13 of appellants' reply brief.

Second.

If they have no prior lien on the legal estate because the mortgages are first on that estate they have a first lien on the equitable estate, which is the enhanced value their material gave to it, which is thirteen thousand three hundred dollars ($13,300) (brief of appellants, page 23). This is under the authority of Getto *vs.* Friend, 46 Kansas, 24, cited on page 28 of appellants' brief and on page 11 of appellees' brief.

Third.

If Conklin's four thousand five hundred dollar ($4,500) mortgage is a first lien because it is a purchase-money mortgage, then the rank of liens would be fixed as in Malmren *vs.* Phinney, 50 Minn., 457, cited in appellants' repiy brief, page 12. That would be: First, New Hampshire Savings Bank to the extent of the Conklin mortgage; second, the mechanic liens; third, the balance of the New Hampshire Savings Bank mortgage; fourth, the Conklin mortgage.

Respectfully submitted,

CHESTER I. LONG,
Solicitor for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 264 (24,405)

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, *Appellants,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265 (24,406)

THE HAINES TILE & MANTLE COMPANY, *Appellant,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 266 (24,407)

THE JACKSON-WALKER COAL & MATERIAL COMPANY, *Appellant,*

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS.

CHESTER I. LONG,
J. A. BRUBACHER,
GEORGE GARDNER,
A. M. COWAN,
Solicitors for Appellants.

CRANE & CO., TOPEKA

SUBJECT INDEX.

CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 264 (24,405)

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, *Appellants*,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265 (24,406)

THE HAINES TILE & MANTLE COMPANY, *Appellant*,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 266 (24,407)

THE JACKSON-WALKER COAL & MATERIAL COMPANY. *Appellant*,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

THE controversy here involved arose in the course of bankruptcy proceedings and presents the question of priority of mechanics liens over mortgages. Prior to January 3, 1911, P. J. Conklin, one of the appellees in these cases, was the owner of a lot or tract of vacant ground in the city of Wichita, Kansas, fully described in the record and commonly called the "Waco Avenue property". On December 20th, 1910, Conklin and the bankrupt, Bron, entered into

negotiations in regard to the sale of this property. Bron, the bankrupt, was engaged in the business of buying city lots and causing the same to be improved by the erection of buildings thereon. P. J. Conklin was familiar with Bron's business, and knew that this property was to be used for the purpose of erecting a building upon it. On January 3, 1911, a deed dated December 31, 1910, was duly executed and acknowledged by Laura Conklin and P. J. Conklin. (Rec. p. 12.) On January 3, 1911, Conklin sold and conveyed the property to Bron. (Opinion of District Court, Rec. p. 125; Finding of Referee, Rec. p. 9.) Bron agreed to purchase the vacant property from Conklin for the consideration of $4,500.00, an amount in excess of its true market value, and Conklin agreed to take back a mortgage from Bron for the entire purchase price of the land and make such mortgage inferior to a mortgage of $7,500.00. (Opinion of District Court, Rec. p. 125.)

The agreement was carried out, and Conklin conveyed the vacant property to Bron on January 3rd, and on January 4th Bron executed and delivered a first mortgage to one E. D. Kimball in the sum of $7,500.00 and a second mortgage to Conklin for $4,500.00, and also a commission mortgage. The deed was recorded on January 4, 1911, at 11:40 A. M. The mortgages were recorded on January 4, 1911, at 12:10, 12:20, and 12:30 P. M. respectively.

The note secured by the first mortgage was, soon after its making and before the building was completed, transferred by Kimball to The New Hampshire Savings Bank, one of the appellees.

The property was greatly improved by the bankrupt Bron, at much expense, to wit: $13,300.00. (Rec. p. 67.) Many mechanic and labor liens were filed against the property, aggregating $7,946.50. (Opinion of District Court, Rec. p. 126.) The appellants in the cases before this court are some of the mechanic lien holders. The appellees are the Savings Bank, the assignee of the first mortgage given to E. D. Kimball, and P. J. Conklin, the holder of the mortgage given for the purchase price of the vacant property.

The referee and the District Court found that the work of improving the property was commenced at an early hour on January 3, 1911. (Rec. pp. 126, 9, 10.)

This work consisted of digging a ditch about 18 inches

wide, 5 or 6 inches deep and 38 feet long in starting the foundation. (Rec. p. 61.) Prior to this time several trees and the brush had been cleared away. The ground had been staked, and was re-staked on the morning of January 3rd before the work was done. (Rec. pp. 58, 60, 25, 52). A load and a half of dirt was hauled away that morning. Shovels, picks, a scraper and a plow were taken to the premises at the beginning of the work that morning. About ten o'clock the morning of January 3rd work was stopped on account of the extreme cold. (Rec. pp. 56, 34.) The work of excavating was continued the morning of January 4th, commencing about eight o'clock. The work proceeded all that day, about fifteen loads of dirt being hauled away (Rec. pp. 27, 56, 66), and thereafter continued from day to day until completed.

The property was sold by the Trustee. There not being enough money to satisfy the material men and the mortgages, a controversy arose as to who was entitled to preference. The Kansas law giving material men and mechanics, liens (Section 6244 General Statutes of Kansas, 1909) is as follows:

> "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement, or structure thereon . . . shall have a lien upon the whole of said piece or tract of land, the buildings and appurtenances, in the manner herein provided. *Such lien shall be preferred to all other liens or incumbrances which may attach to, or upon said land, buildings or improvements, or either of them, subsequent to the commencement of such building.*" (Italics ours.)

The Kansas law relating to the recording of deeds and mortgages is Section 1672 of the General Statutes of Kansas, 1909, as follows:

> "No such instrument in writing shall be valid, except as between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

The Referee found that the work on January 3rd was *fraudulently begun* by the bankrupt Bron for the purpose of giving preference over the mortgages to any mechanics liens to be thereafter created and established. (Rec. p. 10.) Upon review, the District Court held that the *motive* with which the work was done was immaterial and set aside the order of the Referee and allowed priority to the mechanics liens. (Rec. pp. 125, 128.)

Thereupon, appeals were taken by the mortgagees to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the District Court and directed that the mortgages be made prior liens on the property superior to the mechanics liens. Thereupon, the mechanics lien holders prosecuted these appeals to this court.

The questions here involved are as follows:

Whether or not the work was begun for the excavation of the foundation before the recording of the mortgages in question.

Whether or not the property was conveyed and the bankrupt Bron was entitled to possession of the property shortly after noon on January 3rd.

Whether or not the work done on January 3rd and the morning of January 4th was such a commencement of the building as to give the mechanic lien holders a prior lien under the Kansas statute.

Whether or not the *motive* with which the work was done on January 3rd and the morning of January 4th by the bankrupt Bron can affect the mechanic lien holders' rights to a priority, and whether there is any evidence to establish fraudulent motive.

There is also involved the question of whether or not under the statute of frauds of Kansas, an oral agreement that the mortgage to Kimball should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt Bron, and be a prior lien on the property, was valid as against mechanic lien holders.

The appellants also contend that as mechanic lien holders, they are entitled under the laws of Kansas to a priority upon the enhanced value of the improvements given to the property by their materials, regardless of the priority of the mortgages.

Appellants insist that the decision of the Circuit Court of Appeals is far-reaching and injurious in its effect on the business of building supply dealers in Kansas and Oklahoma, who have been furnishing materials in reliance on the protection they thought was afforded them by the mechanic lien statutes. The decision of Circuit Court of Appeals has injected into the statute the question of the *motive* with which the work of commencing the building is done. Thus the protection which was heretofore certain has become uncertain, depending upon what may be afterwards proved as to the motive lurking in the mind of the owner in having the work done.

ASSIGNMENT OF ERRORS.

I.

The court erred in deciding and holding that the mortgages of the New Hampshire Savings Bank and P. J. Conklin were prior liens upon the property in question, and superior to the mechanics lien of G. F. Varner and W. E. Marshall, partners, doing business as the Wichita Lumber Company.

II.

The court erred in reversing the judgment and decree of the District Court, which adjudged and held the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to be prior to the mortgages of The New Hampshire Savings Bank and P. J. Conklin.

III.

The court erred in holding that the deed to the bankrupt was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4, 1911, and that the right of possession did not vest in the bankrupt until January 4, 1911, for the reason that by stipulation of the parties filed in the cause (Transcript of Record p. 12) it was agreed and admitted that Mrs. Conklin acknowledged the deed January 3rd, and for the further reason that the

Referee in Bankruptcy and the District Court found that the property in question was conveyed to the bankrupt on January 3, 1911, while by stipulation of all of the parties it was agreed and admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were acknowledged on January 4th and filed for record after noon on that day.

IV.

The court erred in holding that the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin attached simultaneously with the vesting of the legal title, and that the legal title vested in the bankrupt on January 4, 1911, and were prior to the mechanics lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, for the reason that the Referee in Bankruptcy and the District Court found that the property was conveyed to the bankrupt on January 3, 1911, and by stipulation of all parties hereto it is admitted that the mortgages of The New Hampshire Savings Bank and P. J. Conklin were not recorded until after noon of January 4, 1911.

V.

The court erred in holding that the mechanics lien of G. F. Varner and W. E. Marshall, doing business as the Wichita Lumber Company, was not a first and prior lien on the improvements put upon the real estate by them, independent of the real estate without the improvements.

VI.

The court erred in holding that the vesting of title in the bankrupt and the attaching of the mortgage liens were simultaneous acts, and that therefore the mortgage liens were prior to the mechanics liens, for the reason that the court found that the deed was delivered in the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement, and the liens of the mortgages did not attach until after noon on the same day.

VII.

The court erred in holding that the vesting of the legal title in the bankrupt and the attaching of the mortgage liens were simultaneous acts and that therefore the mortgage liens were prior to the mechanics lien, for the reason that the alleged agreement between the bankrupt and P. J. Conklin that the delivery of the deed and the execution and recording of the mortgages were to be part of one transaction was not shown to be in writing as required by Section 3838 of the General Statutes of Kansas, 1909, then in full force and effect, and therefore such agreement, if any, was null and void.

VIII.

The court erred in holding that the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, was inferior to the mortgage lien of The New Hampshire Savings Bank, for the reason that the said mechanics lien attached to the legal and equitable estate of the bankrupt prior to the recording of the mortgage of the said The New Hampshire Savings Bank after noon of January 4, 1911.

IX.

The court erred in holding that the vesting of the title in the bankrupt through the delivery of the deed from P. J. Conklin and wife, and the attaching of the mortgage lien of The New Hampshire Savings Bank were simultaneous acts, and that therefore the said mortgage lien was prior to the mechanics lien of G. F. Varner and W. E. Marshall, for the reason that the court found that the deed was delivered during the morning of January 4, 1911, which vested the full legal title in the bankrupt from the time of delivery with the right to commence work on the improvement, and the mortgage lien of The New Hampshire Savings Bank did not attach until after noon on the same day.

X.

The court erred in holding that the work done by the

bankrupt on the morning of January 3rd and the morning of January 4th in excavating for the foundation of the building was not such work as amounted to the commencement of the building, for the reason that the intent or purpose with which the bankrupt did the excavating could not affect, defeat or postpone the mechanics lien of G. F. Varner and W. E. Marshall, doing business as Wichita Lumber Company, they not being required under the Kansas mechanics lien law to ascertain the intent which actuated the owner in commencing the improvement.

XI.

The court erred in holding that the intent and purpose with which the bankrupt began the excavation for the building on January 3rd and the morning of January 4th, 1911, subordinated the mechanics lien of G. V. Varner and W. E. Marshall, doing business as Wichita Lumber Company, to the mortgage liens of The New Hampshire Savings Bank and P. J. Conklin, whose mortgages were not filed for record until after noon of January 4, 1911, the intent of the owner in commencing the improvement not being material in this controversy between lien holders.

XII.

The court erred in holding that as to P. J. Conklin and the assignor of The New Hampshire Savings Bank, E. D. Kimball, the work done by the bankrupt's son and Underwood on the premises on the morning of January 3rd and the morning of January 4th, 1911, and prior to the execution and recording of the said mortgages, was not such work as amounted to the commencement of the building within the meaning of the Kansas statute, for the reason that both said P. J. Conklin and E. D. Kimball knew at said time that a building was to be erected upon the premises, and said Conklin had agreed to convey said property to the knowledge of said Kimball with that object in view.

(The Assignment of Errors in the other cases are the same.)

I.

THE PROPERTY IN CONTROVERSY WAS CONVEYED TO THE BANKRUPT ON JANUARY 3, 1911, AND THE WORK OF EXCAVATING FOR THE FOUNDATION WAS BEGUN ON JANUARY 3, 1911, AND CONTINUED ON THE MORNING OF JANUARY 4, 1911.

It is a well settled rule of this court, that findings of fact made by a master and approved by the District Court will not be set aside except where it is clearly shown that the findings are totally unsupported by the evidence. *Arana De Villaneuva v. Villaneuva*, —— U. S. ——, 36 Sup. Ct. Rep. 109; *Tilghman v. Proctor*, 125 U. S. 138, 8 S. Ct. 894.

The same rule obtains in the various circuits in bankruptcy matters. *Poff v. Adams, Payne & Sleave*, 226 Fed. 187; *Boswell National Bank v. Simmons*, 190 Fed. 735; *Coder v. Arts*, 152 Fed. 943; *Epstein v. Steinfeld*, 210 Fed. 236; *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155; *Hussey v. Richardson-Roberts D. G. Co.*, 148 Fed. 598.

Yet the Circuit Court of Appeals in this case has stated that several facts are undisputed, which are not only contrary to the express findings of the Referee and the District Court, but contrary to the express stipulation of the parties. The Circuit Court of Appeals states that the negotiations for the purchase of the land by the bankrupt Bron from Conklin were consummated by the deed from Mrs. Conklin and her husband to the bankrupt Bron delivered January 4th, 1911. This is contrary to the express findings of the District Court and the Referee. The Referee found (Rec. p. 9):

> "Prior to January 3rd, 1911, the creditor Conklin was the owner of, and occupied as his homestead, the following described property: (Here follows description.)
>
> "*On that date Conklin conveyed this property by deed to Charles Bron, the bankrupt.*"

The District Court said:

> "The facts are, prior to January 3, 1911, P. J. Conk-

lin was the owner of a lot or tract of vacant ground in the city of Wichita, fully described in the record and commonly called the 'Waco Avenue Property'. On that day Conklin sold the property to the bankrupt who was engaged in the business of buying city lots and causing the same to be improved by the erection of buildings thereon."

Now what is the evidence to support this? The stipulation between the parties (Rec. p. 12) shows the deed acknowledged by P. J. Conklin and wife on January 3, 1911. Ginzel, son-in-law of appellee Conklin, took the deed to Mrs. Conklin at noon at her house and she attached her signature and he brought it back to the office about two o'clock. (Rec. p. 85.) The bankrupt Bron testifies positively that he received the deed from Conklin the afternoon of January 3rd and took it to Kimball, and on the strength of it received a check for $750.00 as an advance from Kimball (which check was introduced in evidence). (Rec. pp. 16, 45, 47.) The son of the bankrupt Bron, who assisted his father in the business, testified that his father told him the evening of January 3rd that he got the deed that day. (Rec. p. 29.) He fixed the date by its being the day following what is known as the "Bitting Fire". The Referee took judicial notice of the fact that such fire occurred on January 2nd. (Rec. p. 44.)

Now the only evidence opposed to this is that of P. J. Conklin, one of the appellees, who stated that he did not think the deed was out of his office the afternoon of the 3rd, and did not have any knowledge of its being out. (Rec. p. 82.) It was sent up the noon of the 3rd to Mrs. Conklin, although Conklin admits that he could have taken it home at night and could have had her sign it then. (Rec. p. 81.) He admits that Bron was in the office that afternoon, and that perhaps Bron may have needed the deed that day, and he trusted Bron. He could not swear positively whether it was taken out of his office that afternoon or not. (Rec. p. 82.) Mr. Conklin always acted for his wife in real estate matters, and she never interfered with his business at all. (Rec. p. 84.) Ginzel, Conklin's son-in-law, did not know whether the deed was taken by Bron the afternoon of January 3rd or not. (Rec. p. 88.) A. O. Conklin, son of appellee Conklin, admits that the bankrupt Bron was in the office the afternoon of January 3rd, but did not know

whether or not Mr. Bron took the deed out that afternoon. (Rec. p. 89.)

The only other witness to the affair was E. D. Kimball, to whom the $7,500.00 mortgage was given. He was not sure that he ever had the deed in his office. (Rec. p. 97.) After several days had intervened, Mr. Kimball, who had transferred the note to the Savings Bank and who was evidently liable on such indorsement, came to the conclusion, when placed on the witness stand again, that the deed was not in his office on January 3rd. (Rec. p. 108.)

It therefore appears from the evidence that this deed, which the Circuit Court of Appeals says it is not disputed was not delivered until January 4th, was actually delivered on January 3rd, and appellants have so contended from the beginning. The Referee and the District Court both found that the property was conveyed on January 3rd. It is therefore apparent that the Circuit Court of Appeals was in error on the subject, and the deed was delivered on January 3rd. It follows that the statement by the Circuit Court of Appeals that the deed was delivered and the mortgages filed of record as one transaction is erroneous. Likewise is the statement:

> "It is the contention of the appellees (appellants here) that the deed to Bron was delivered on January 3rd, but the great weight of the testimony convinces that the deed was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4th, and that it was not delivered until that morning there is no doubt under the testimony."

As we have already pointed out, the express stipulation of the parties (Rec. 12) and the instrument itself show that the deed was acknowledged by Mrs. Conklin on January 3rd. The findings of the Referee, the District Court, and the only positive evidence on the subject, shows it was delivered on January 3rd.

But, regardless of the date of the delivery of the deed, the sale was made on December 22nd. The terms were agreed upon December 22nd, the deed was drawn on December 31st and the abstract delivered to Bron. Such is the testimony of P. J. Conklin, the real owner of the property, and of Bron, the bankrupt. (Rec. pp. 78, 80, 84, 45,

state, there can be no doubt but that when the work for the excavation for the foundation or cellar of a building to be erected is begun, the work of improving the property has *commenced* within the meaning of the statute, and that any person can then search the records, and if no mortgage or other incumbrance be found of record, he may safely rely on his rights under the law to perfect a mechanic's lien in the furnishing of labor or material used in the construction of such improvement, as against any such encumbrance thereafter filed."

The Court of Appeals agreed with the law as stated above, but held that the work was not sufficient to amount to the commencement of the building. (Rec. p. 150.)

This holding purports to be based upon the decision in *Kansas Mortgage Company v. Weyerhaeuser*, 48 Kan. 335. That decision was limited to a determination of whether or not placing material upon the ground was the commencement of a building. The Supreme Court of Kansas held that it was not, saying:

> "The commencement of a building in law takes place with the digging and walling of the cellar. It is some *work or labor on the ground, such as beginning to dig the foundation* which everyone can readily see and recognize, as the commencement of a building. . . As the avowed object and main purpose is to create an impression upon the mind of any person who seeks to purchase or acquire an interest or lien in the land, the acts indicating that a building thereon is being commenced ought to consist of work of such character that a person of ordinary observation could determine that a building was in the process of construction."

In *Thomas v. Mowers*, 27 Kan. 265, it was decided "that the commencement of a building within the meaning of the statute was at the time of the *commencement of the excavation for the cellar.*

Now what is the evidence as found by the Referee on this subject? "At an early hour of January 3, 1911, Bron entered upon the premises with laborers and did an hour or two's work toward excavating for the foundation of a building which was to be erected on the premises." (Rec. p. 9.)

In other words, this is exactly the kind of work that the Supreme Court of Kansas has held amounted to the commencement of the building. It was "the beginning to dig the foundation". There can be no doubt that the work of January 3rd was such as to indicate to any mind that the work of excavating for the foundation had been commenced. A ditch 5 to 6 inches deep, 18 inches wide and 38 feet long was dug that morning along the lines prescribed by stakes, which stakes outlined the foundation of the building. The shrubbery and brush had been cleared away, and a plow, scraper, picks and shovels were on the premises. Moreover, both Conklin and Kimball, the mortgagees, knew that a building was to be erected on this property and the work done was sufficient to notify them, with this knowledge in mind, that work had been commenced, had they looked that morning. The work, the Supreme Court of Kansas says, must be of such a character as to create an impression on the mind of the person who seeks to acquire a lien in the land. These mortgagees knew that a building was to be erected thereon, knew that it was to be commenced shortly, and the stakes set out there, together with the utensils for such labor and the clearing of the shrubbery and brush, and this ditch surely were sufficient to notify them that a building had been commenced. In any event the work on the morning of January 4th, done before the mortgages were recorded, was of a very substantial nature. The Circuit Court of Appeals (Rec. p. 150) concedes that work was done on the morning of January 4th. This work on the morning of the 4th was done by four men, who during the working day removed 15 wagon loads of dirt. (See p. 12 of this brief.) The Court of Appeals not having sufficient faith in its statement that the character of the work was not sufficient, really places its decision on the ground of the *motive* with which the work was done on the mornings of January 3rd and January 4th. (Rec. p. 150.)

III

THAT THE BANKRUPT, BRON, DID THE WORK ON THE MORNINGS OF JANUARY 3RD AND 4TH, 1911, WITH THE MOTIVE OR INTENT OF PREFERRING THE MECHANIC LIEN HOLDERS TO THE MORTGAGEES, CANNOT AFFECT THE RIGHTS OF THE MECHANIC LIEN HOLDERS, WHO HAD NO NOTICE OR KNOWLEDGE OF BRON'S MOTIVE OR INTENT.

That work was done by the bankrupt on the excavation for the foundation before the filing of the mortgages was a finding by the Referee which was approved by the District Court. The mortgages were not filed until after noon on January 4th. There was work done on the excavation in the morning of both January 3rd and 4th. The Referee found that it was fraudulently done and did not for that reason amount to a commencement of the building. He said (Rec. p. 10):

> "And the creditors having mechanic's liens, which were co-equal, were entitled to a third lien, without preference to any of them, their liens not having precedence over the mortgages, the actual beginning of the work not having been commenced until after the third day of January, 1911, the work done by the bankrupt on that day being fraudulently done by the bankrupt for the purpose of giving preference, over the two mortgages, to any mechanics liens to be thereafter created and established."

Of this contention the District Court said (Rec. p. 127):

> "In this respect, as has been seen, the referee finds in conformity to the proofs found in the record the first work was actually done on the lot toward the construction of the improvement early on the morning of January 3, 1911, prior to the time of the filing of the mortgages. However, the referee declines to take this as the time at which the building was actually commenced because of the intent which he finds in the mind of the bankrupt to prefer the mechanics and laborers to the mortgagees. However, the intent with which the bankrupt acted in this matter, even if true

> in point of fact, is not the criterion by which the rights of the parties litigant are to be judged and determined. If the work was commenced on the improvement within the meaning and intent of the statute, prior to the time at which the liens of the mortgages attached by their being filed for record, then the mechanics' liens are prior in point of equity to the liens of the mortgagees and must be so declared as to the Lumber Company here petitioning for review."

The Court of Appeals, however, took the view of the Referee, and while conceding that the work was done on the mornings of January 3rd and 4th, held that the work was not within the meaning of the statute being commenced fraudulently. (Rec. p. 150.)

It also stated that point in another part of the opinion as follows (Rec. p. 150):

> "It is true that under the Kansas statute as construed by the Supreme Court of that state, mechanics' liens date from the commencement of the building or improvement. *Thomas v. Mowers*, 27 Kan. 265; *Chicago Lumber Co. v. Schweiter; Getto v. Friend*, above, and *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335 (29 Pac. 153). This, of course, means a commencement of the building in good faith and not a mere pretense at commencement to defeat prior liens upon the property."

The Circuit Court of Appeals by this decision has added something to the Kansas statute which was never in it before. It adds the element of motive with which the work was done on which the statute is silent and which the Supreme Court of Kansas has never indicated should be in the statute.

The bankrupt Bron had title to and possession of the property more than a day before the mortgages were executed and recorded.

Between the conveyance to him of the property and the execution and recording of the mortgages work was done on the property, some being on the 3rd (Record 9) and again early in the morning of the 4th. (Record 27, 34, 56, 63.) So whatever Bron's intent was on the 3rd, work was

done on the 4th before the recording of the mortgages at 12:10 P. M. January 4th, 1911. This alone would give the mechanic lien holders a prior right.

But the Kansas mechanic lien law statute provides absolutely for a lien in favor of the material men "and such lien shall be preferred to all other liens or encumbrances which may attach to or upon said land, buildings or improvements or either of them subsequent to the commencement of such building."

If the dirt was actually removed in the course of excavating for the foundation or cellar the building had been commenced. The motive or intent of the laborer or one who directed the laborers who removed such dirt is immaterial. The controlling feature is the commencement of work. The statutes and the decisions of the Kansas Supreme Court date the mechanic's lien from the time the work is first done.

In the case of *West v. Badger Lumber Company*, 56 Kan. 287, it was held that the owner of real estate who was induced by fraud to convey the title thereto to another under a contract contemplating the construction of buildings thereon, cannot in an action to set aside the conveyance and discharge the property from all liens, defeat the claims of persons who in good faith relying on the apparent title of the fraudulent purchaser have furnished material and performed labor in the construction of the buildings and have complied with the statutory requirements in filing their liens. The fraud of the purchaser in the foregoing case in securing the title to the property did not affect the mechanics' liens, so in this case how can the fraud of the owner in starting the work affect the appellees who were not parties to that fraud, if any there was? We insist that innocent parties, such as the appellees, under the statute which gives mechanics' liens upon the commencement of the work should not be dependent upon the mental processes of the owner of the property and should not be compelled to become mind readers.

There is nothing in these cases to justify a doubt in regard to the *bona fides* of the claims of the lien holders. The evidence shows that the materials were furnished, as charged by the claimants, and the debts have not been paid. The Referee finds that the amounts are due, and the only

question is as to the priority of their claims over the mortgages. There is no intimation that they had any knowledge of the agreement between Bron and his mortgagees that no work should be begun until after the mortgages were filed. The Court of Appeals states that if the mechanic lien holders had examined the record, they would have found that the mortgages were executed and filed for record at the same time the deed to the bankrupt was executed, and as a part of one transaction. This misstates the facts, as stipulated by the parties and proved by the records. If the mechanic lien holders had examined the record, they would have found the deed to Bron dated December 31, 1910, acknowledged January 3, 1911, and filed for record January 4, 1911, at 11:40 o'clock A. M. They could continue their investigation and find that work had been commenced on the building on the morning of January 3rd, the day the deed was acknowledged, and continued on the morning of January 4th, before the mortgages were deposited for record.

When a Kansas statute provides that a mechanic shall have a lien which shall be preferred to all other liens, which shall attach subsequent to the commencement of the building—and another statute provides that a mortgage shall not be valid, except as to the parties, until the mortgage is deposited for record, it makes the dates when the respective acts were done the sole criterion in determining the priority between the mechanics' liens and the mortgages. It is conceded that when the date of the commencement of the building is fixed, that all mechanics' liens are determined by that date, no matter when the contract for the material was made or when the material was delivered. (Rec. p. 27.) When the material men ascertained when the building was commenced and when the mortgages were filed, they ascertained all the facts necessary in order to determine whether they could safely sell material to Bron. They found that the building was commenced when the excavation was begun and that date was before the mortgages were deposited for record. They then knew that a mechanic's lien would be prior to the mortgages. They were not chargeable with notice as to contracts between Bron and his mortgagees that were not of record. If they could see that the excavation had been begun and it was before the mortgages were deposited for record, they were safe in furnishing the material.

The Referee and the Court of Appeals give weight and

consideration to the motive or intent with which Bron commenced the excavation for the building before the mortgages were recorded. The Referee declined to accept the work done on January 3rd and the morning of January 4th, because he found that it was fraudulently done for the purpose of giving preference over the two mortgages. This, in effect, is charging the mechanic lien holders with knowledge of the purpose and motive of Bron in commencing the work, and injects into the Kansas statute an element which is not found therein. The mechanic lien holders were not parties to the fraud, if any was committed, and could not be affected by the motive of Bron. Being innocent parties, they could not be chargeable with his fraud on the mortgages. Fraudulently commencing a building is not a void act of itself so that no one may acquire rights by it. The situation of the mechanic lien holders is the same as that of an innocent third party purchasing a note which could not be enforced between the original parties, but which in no way prejudices the rights of an innocent holder. The case of *Gordon v. Torrey*, 15 N. J. Equity, 112, is a case clearly in point. In that case the building was commenced before the mortgage was executed, but the owner concealed from the mortgagee the fact of the existence of the mechanic liens. The court says:

> "If it be admitted that Torrey acted in violation of good faith in concealing or in failing to disclose the existence of the liens at the time he procured the loan from the complainant for which the mortgage was given, it cannot affect the legal or equitable rights of the lien holders. Nor are those rights at all impaired if it be admitted that the liens were filed at the instance of Torrey. He may, in perfect consistency with good faith and fair dealing, have desired that the just claims of the mechanics and material men should be secured upon the building, in preference to the Oakley mortgage, which he then believed, and subsequently proved to be fraudulent. But if Torrey was actuated by fraudulent motives it could not affect the rights of the lien holders. The validity of the liens cannot depend upon the motives which suggested their being filed. There is nothing in the evidence to affect the validity of the liens, or their priority to the complainant's mortgage."

It is often cited with approval, in "Phillips on Mechanics' Liens", Second Edition, Sec. 255, as follows:

> "It is no objection to the validity of mechanics' liens that the mortgagor procured them to be filed, or that he concealed them from the mortgagee at the time of obtaining the loan for which the mortgage was given. If the mortgagor was actuated by fraudulent motives, it cannot affect the rights of *bona fide* lien holders."

The Referee and District Court found that the property was conveyed to Bron on January 3rd. He testified that the deed was delivered to him on that day. He thus had a right on obtaining the legal title, the equitable title to which he had held since December 22, 1910, to commence work on the building on the day he got his deed. The Referee and Court of Appeals admit he did so. He had a right to commence the building on that day. By so doing, he may have violated an agreement made with Conklin and Kimball. That cannot affect the right of the mechanic lien holders to rely on the date of the commencement of the building, which was before the mortgages were recorded. Bron had the right to commence a building at any time after December 22nd. He did some work, in fact, during that month, but what he did on January 3rd was a commencement of the building under the Kansas statute, as construed by the Supreme Court of that state, and his motive in commencing the building then instead of later is immaterial.

Judge TAFT, in *Warax v. C. N. O. & S. Rlw. Co.*, 72 Fed. 640, said of *motive*: "If the right exists, the motive for its exercise cannot defeat it." He also held the same in *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 751, and Judge (afterwards Justice) LURTON concurred with him in both cases.

This court has repeatedly held that the motive which prompts the doing or not doing of an act is immaterial. In *D. W. & Co. v. C. M. & St. P. Ry. Co.*, 85 Fed. 876, 879, it was said:

> "The motive of the railway company in seeking a removal is to avoid a trial in the state court, and the motive of the plaintiff in joining the defendants is to avoid a trial in the federal court. These motives can

not be availed of to defeat the right of removal, if it legally exists, nor to defeat the right to remain in the state court, if the statute does not authorize a removal."

This case was cited with approval in *Chicago R. I. & P. Ry Co. v. Dowell*, 229 U. S. 102, 33 S. Ct. 684. See also *Illinois C. R. Co. v. Sheegog*, 215 U. S. 308, 30 S. Ct. 101.

We submit that under the law, as construed by the Supreme Court of Kansas, supported as these decisions are by the cases above referred to, that the finding of the Referee that he would not accept the work begun on January 3rd and the morning of January 4th because of Bron's motive in doing such work, was erroneous, and the Court of Appeals was in error when it accepted and approved this finding of the Referee. The District Court was right in holding that the motive or intent of Bron was immaterial, as against the mechanic lien holders, and as this question of motive is the controlling one in the case, being the basis of the decision of the Court of Appeals, the District Court's interpretation of the statute and the law should be upheld by this court.

IV.

MECHANIC LIEN CLAIMANTS ARE ENTITLED TO A LIEN UPON IMPROVEMENTS SEPARATE FROM THE LAND, REGARDLESS OF THE PRIORITY OF THE MORTGAGES.

The land which the District Court found was not worth over $2,300.00 was improved by the material of the mechanic lien holders to the extent of $13,300.00. (Rec. pp. 125, 67, 72.) We contend, with the District Court, that inasmuch as the money furnished by the mortgagees did not go to pay for the improvements on the land, and the mortgagees did not see that the money so advanced by them was applied in the payment of the material which went to improve the property, the mechanic lien holders are entitled to a first lien on the enhanced value of the property made so by their labor and material, regardless of the priority of the mortgagees.

On this the District Court said (Rec. p. 128):

46.) Bron, in fact, had the equitable estate in this property from December 22, 1910, and was the owner thereof from that date and could, under the Kansas law as declared by the Supreme Court of that state, contract with material men and mechanics liens would attach to the interest which he owned and be prior to any mortgages filed subsequent to the commencement of the excavation for the building. *Smith Lumber Co. v. Arnold*, 88 Kan. 465, 468.

The work of excavating for the foundation was actually commenced on January 3rd, shortly after eight o'clock. Stakes had been set some days before while the lot was covered with shrubbery and some trees. Between Christmas and New Year's the shrubbery and trees within the space marked by the stakes and in which the excavation for the cellar was made were removed. On January 2nd, while the son of the bankrupt was watching what is known as the "Bitting Fire", he met Underwood and Jones, who had been given the contract by the bankrupt for excavating for the cellar and foundation and told them to go to work the next morning at eight o'clock. At eight o'clock the morning of the 3rd the son of the bankrupt was on the property, and a few minutes thereafter Underwood came with a wagon, scraper, plows, picks and shovels. The stakes were remeasured, and it was found that owing to the shrubbery which had been there the stakes were not accurately set. (Rec. pp. 56, 61, 58, 60, 25, 52, 34, 66, 27.) The son of the bankrupt then reset the stakes, and Underwood used a pick to start the excavation. The ground was frozen to a depth of six or seven inches. Underwood dug a place about 18 inches wide, 5 to 6 inches deep and 38 feet long, working until about 10 o'clock, when he quit on account of the cold. Underwood hauled one full wagon load of dirt away and another small one. (Rec. pp. 55, 61.)

The next morning (January 4th) at eight o'clock Jones, Underwood and others continued the work of excavating, and worked all day, removing about 15 loads of dirt. The work was continued on the 5th and from day to day until completed. On January 7th (Saturday) Jones and Underwood got a check from Bron in order to pay off the laborers whom Jones and Underwood hired and who had been employed on the work of excavation during that week. (Rec. pp. 30, 56, 63, 66.) This is the testimony of Underwood who was employed on the work and who received pay for his

work before the bankruptcy proceedings, and therefore was an entirely disinterested witness. It is also the testimony of Jones, who occupied the same position as Underwood. (Rec. p. 150.)

Likewise it is the testimony of Charles Bron, the bankrupt, who was not financially interested in the matter of priority. Such also is the evidence of the son of the bankrupt who had no interest in the question of priority.

The testimony of these witnesses is supported in part by memoranda, part of which was made by Kimball himself. In fact, Kimball on January 3, 1911, delivered to Bron a check for $750.00 as an advancement on the mortgage. (Rec. pp. 16, 18, 47.) Kimball required that work be commenced before he made any advancement on a mortgage. For this reason Bron had the work started on the morning of January 3rd, and thereby was able to obtain a $750.00 check from Kimball on the afternoon of January 3rd, 1911. (Rec. pp. 47, 48, 16.)

Opposed to this is the testimony of E. D. Kimball, to whom the note was given and who had transferred it to one of the appellees; Mrs. Conklin, wife of one of the appellees; P. J. Conklin, one of the appellees; Stanley Conklin, son of the appellee Conklin; and C. L. Ginzel, son-in-law of the appellee Conklin. All of these testified positively that there was no work done on the lot, not even the shrubbery removed, until after January 8th.

Of these witnesses Mrs. Conklin testified that it was cold weather during the early part of January; that there was frost on her window through which she would have had to look to see whether any work was being done on the adjoining lot, and that she was ill with a heavy cold. (Rec. 93.) Stanley Conklin, son of appellee, had no distinct recollection of being on the north side of his home on January 4th. (Rec. p. 97.)

With this conflict of evidence, the Referee found that there was work done for a couple of hours on the morning of January 3rd toward the excavation for the foundation of the building which was to be erected on the premises. (Rec. p. 9.) In this finding of the Referee the District Court concurred. (Rec. p. 127.)

As both the Referee and the District Court on the con-

flict of evidence found that the bankrupt, his son, and Underwood and Jones were telling the truth as to the work on January 3rd, it follows that their testimony as to the work on January 4th must also be taken as true, though the Referee makes no specific finding as to the work on that date. Under the rule of this court that on a conflict of evidence the findings of fact of the Referee approved by the District Court will be followed, it is evident that the property was conveyed to the bankrupt on January 3, 1911, and that work was commenced on that day for the excavation of the foundation, and a ditch 38 feet long, 6 inches deep and 18 inches wide was dug on the morning of January 3rd, and the excavating continued on the morning of January 4th prior to the recording of the mortgages involved herein.

In this connection we wish to call attention to another mistake in the statement of the evidence by the Circuit Court of Appeals. That court stated that on January 3rd it was so cold that Mrs. Conklin could not go out to complete the execution of the deed to the property to the bankrupt. (Rec. p. 149.) This, however, it directly contrary to Mrs. Conklin's testimony. She states that she took a heavy cold the night of the "Bitting Fire" (the night of January 2nd) and was too ill to go down town the next day, which was the reason the deed was brought to her house for her signature. (Rec. pp. 91, 93.)

II.

UNDER THE KANSAS STATUTE, AS CONSTRUED BY THE SUPREME COURT OF THAT STATE, A BUILDING IS COMMENCED WHEN WORK OR LABOR IS BEGUN ON THE EXCAVATION FOR THE FOUNDATION, WHICH IN THIS CASE WAS ON THE MORNING OF JANUARY 3RD, AS FOUND BY THE REFEREE AND APPROVED BY THE DISTRICT COURT.

The District Court found that the work done before the filing of the mortgages amounted to the commencement of the building. See Record p. 128, where the District Court said:

"Under the decisions of the Supreme Court of this

party so assigning or granting the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

"3838. *Debt of another, etc.*—6. No action shall be brought, whereby to charge a party . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized *in writing*."

A mortgage comes within the provisions of this statute. *Bell v. Coffin*, 2 Kan. A. 337.) The mortgage to Kimball (the New Hampshire Savings Bank mortgage) for $7,500.00 was not a purchase price mortgage, and depends for its rights entirely on the fact of the time of its filling for record. The verbal agreement that this mortgage should be filed of record at the same time the deed was deliverd was void under the above statute, as it attempted to confer an estate in lands longer than one year in duration. As it was void, no matter when the deed was delivered, the mechanic liens attached ahead of this mortgage. The deed was filed of record at 11:40 A. M., and the mortgage was not recorded until 12:10 P. M. In the meantime the beginning of the excavation for the foundation had taken place on the lots and for thirty minutes the title vested in Bron, under any view of the facts, before the rights of the Kimball mortgage attached. Momentary seizin is sufficient to permit the rights of lien holders to attach. (*Osborn v. Barnes*, 179 Mass. 597, 61 N. E. 276; *Ansley v. Pasharo* (Neb.), 35 N. W. 885.)

Moreover, mechanic lien holders are generally considered purchasers for value under the recording acts. (27 Cyc. 240.)

The agreement to make the Kimball mortgage a first mortgage, not having been recorded, was void as to the mechanic lien holders. So under either view of the law the oral agreement was void as to the appellants, and therefore

the rights of Kimball did not attach until after the liens of the mechanic lien holders.

The cases which the Circuit Court of Appeals cites do not have any bearing on this phase of the matter. (Rec. p. 147.)

The case of *Huff v. Jolly*, 41 Kan. 537, deals only with the question of title and right of possession and has nothing to do with priority of mortgages.

In the case of *Chicago Lumber Company v. Schweiter*, 45 Kan. 207, the contract between the vendor and vendee and the mortgagees was in writing, and therefore the question of the statute of frauds was not involved.

The report of the case of *Getto v. Friend*, 46 Kan. 24, does not show whether the agreement with Getto preferring the mortgages of George C. Strong (afterwards assigned to Melrose and Rogers) to his purchase price mortgage was in writing or oral. The question of the statute of frauds was not raised, but the court did hold that the mechanic lien holders should be prior to all mortgages on the equitable estate of Peavey (the man who erected the building) except to the amount of the purchase price mortgage.

The cases of *Missouri Valley Lumber Company v. Reid*, 4 Kan. A. 4, and *Wagar v. Briscoe*, 38 Mich. 587, have to do with purchase price mortgages only.

The cases of *Hayes v. Fessenden*, 106 Mass. 230, and *Conrad v. Starr*, 50 Iowa 470, do not involve a mortgage such as the Kimball mortgage (New Hampshire Savings Bank, assignee). The oral agreement that the execution of the deed and delivery of the two mortgages should create one transaction could in any event apply only to the purchase price mortgage, to wit, the Conklin mortgage (27 Cyc. 250, and cases cited). It has no application whatever to an ordinary mortgage. As such an oral agreement as to the Kimball mortgage cannot be invoked against the mechanic lien holders who had no notice or knowledge of such agreement, the Kimball mortgage did not attach until it was filed of record, as it was void under the recording acts of Kansas until it was recorded. At the time it was recorded the deed to Bron to the property had been of record for thirty minutes, and under the findings of the Referee and the District Court it had been delivered for almost a day, and the

excavation had been commenced. Therefore, the appellants should at least be prior to the Kimball mortgage (New Hampshire Savings Bank, assignee), whatever may be the rights of Conklin and the assignee of Kimball as between themselves.

CONCLUSION.

The appellants in this court of course want to collect their debts by establishing the priority of their liens. But there is a more important question involved which is the reason for these cases being here. Appellants are dealers in lumber and other building materials. They do business in Kansas and in Oklahoma, whose mechanic lien law is similar to the Kansas law. They have conducted their business and sold their materials relying on their right to establish liens on the property whose value has been enhanced by the materials so furnished. Under the Kansas law as construed by the Supreme Court of that state, they have heretofore relied on the public record and the date of the commencement of the building. They could thus determine whether they were in position or not to establish a lien. The Judge of the District Court who decided these cases below, construed the statute as the Kansas Supreme Court had construed it. He had been at one time a member of that court, and was familiar with its decisions.

Appellants believe that the Court of Appeals has put an unwarranted construction on the Kansas statute. That court has injected into it the question of the motive or good faith of the owner in the commencement of the building. It would place mechanics and building material dealers at the mercy of owners and their mortgage creditors, and would give force and effect to oral, secret agreements between them of which the mechanics and building supply dealers have no knowledge. The decision of the Court of Appeals amends the Kansas law, and by doing so emasculates it and makes it hazardous and unsafe to rely upon in the conduct of their business. They are not in a position to ascertain or determine the good faith or motive with which an owner commences a building. They should not be compelled to do so. They are not required to do so in the state courts, and the result of this case will determine whether they can rely on a construction of a state statute

which has been given to it by the highest court of the state, and which contains no Federal question.

The Referee, the District Court, and the Court of Appeals found that work was done on January 3, 1911, the day before the mortgages were filed for record, but the Referee and the Court of Appeals said it was done fraudulently and not in good faith, and in order to give preference to the mechanic liens. The District Court held that the intent or motive in doing the work was immaterial, so long as it was done before the mortgages were filed, and we contend that the District Court was right and should be affirmed, and that the Court of Appeals was wrong and should be reversed.

Respectfully submitted,

CHESTER I. LONG,

J. A. BRUBACHER,

GEORGE GARDNER,

A. M. COWAN,

Solicitors for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 264 (24,405).

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, APPELLANTS,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265 (24,406).

THE HAINES TILE & MANTEL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 266 (24,407).

THE JACKSON-WALKER COAL & MATERIAL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANTS.

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF ON BEHALF OF APPELLANTS.

The statement of facts on behalf of appellees is incorrect in a number of particulars. The evidence and findings of the referee and the district court establishing that the prop-

"Under all the circumstances of this case, the facts found in the record and stated by the Referee, I am of the opinion the mechanic's lien of the Lumber Company is, and of right should be, prior in equity to the mortgage of the Savings Bank, the mortgage of claimant Conklin and the commission mortgage. More especially is the result reached equitable and just when it is considered neither Conklin, Kimball, nor the Savings Bank, who took liens to secure more than $12,000 on property when taken not worth more than one-fourth of that amount, took no steps to see the proceeds of the first mortgage were applied in satisfaction of the demands of the mechanics and material men who created the improvement to which all the while they expected to look for security, well knowing that if they did not do so and the same remained unpaid, as in this case, by the bankrupt, to realize on their securities they must appropriate to their use the property and labor of others, in such case equity must demand and the statute law of the state does protect the mechanic and laborer in that which he has thus created."

This holding is sustained by the recent case of *White v. Kincade*, 95 Kan. 466, 469, where it is said:

"A vendor of one who induces one who has contracted to purchase it to expend labor and material in improving the land cannot defeat the claims for a lien of those who contribute their labor and material to enhance the value of his property. In such case, in the absence of a controlling agreement, he cannot insist that the mechanic's lien shall be subordinate to his mortgage subsequently given for the unpaid purchase price of the land when the sale is completed and the title transferred."

The rule that a mechanic's lien takes precedence on the enhanced value of the estate made so by the labor and material of the mechanic and the material man, over prior liens existing on the real estate alone before the improvements were placed thereon, finds support in the legislation and decisions of Alabama, Arkansas, California, Colorado, Illinois, Indiana, *Kansas*, Kentucky, Louisiana, Mississippi, Montana, New Jersey, Oregon, Pennsylvania, South Dakota, Texas, and Virginia.

Vol. 20 A. & E. Ency. of L., 2d Ed., 479, and authorities there cited.

It has been so decided, not only in those states where the statute in plain and unequivocal language so provided, but also where by the application of equitable principles the statute could be so interpreted without doing violence to its language. The language of our statute is:

> "Such lien shall be preferred to all other liens or encumbrances which may attach to or upon such land, buildings, or improvements, *or either of them*, subsequent to the commencement of such buildings, etc."

Of course, it is not claimed that such liens can attach to a building or improvement as personal property; but where the building or improvement is placed on the land by one who has an interest in the land, actual or contingent, such interest will support the lien, and the lien will cover the said improvements, as well as said interest.

Thus, it has been held in Kansas, that a lease-hold estate will support a mechanic lien, and the lien thus created will cover a creamery and its machinery and fixtures placed thereon, although the tenant had the right to remove the building, machinery and fixtures at the end of his term.

Hathaway v. Davis, 32 Kan. 693.

The issue in the last cited case was not between the owner or the fee and the mechanic lien claimants, but between the latter and the owner of a chattel mortgage given on the property.

The construction of the statute as contended for by the appellees was announced in *McCrie v. Lumber Co.*, 7 Kans. Ct. of App. 39, where it is said:

> "Under the provisions of Sec. 630 of the Code (Gen. Stat. of Kansas 1889, page 4733), in relation to mechanic liens in cases where there were prior liens upon the land, the mechanics or material men are entitled to priority on the *new structure* erected entirely by them and from their material, independent of the land itself."

On pages 46 and 47 the court says:

"The words 'either of them' are sufficient to indicate that the legislature intended a lien to attach to the buildings independent of the land itself. This construction has been placed by other states upon similar statutes. In some of the states the details by which this separate lien is worked out are more specific in legislative enactment, but such intention is no more clearly expressed. And we conclude that under the provisions of this statute the material men and mechanics had a prior lien upon the building erected by them. It can be worked out either through a finding of the court as to the respective values or separate appraisement of the buildings and land, under the direction of the court, and an award of the amount *pro rata* to each lien holder from the proceeds of the sale *in solido*. While the judgment liens attached to the land prior to the commencement of the building, they did not attach to the building until after the liens of the mechanics attached thereto under the express provisions of the statute."

The evidence in the present proceedings showed that the chief, and practically the only security, that the mortgage claimants had, was on the enhanced value, made so by the labor and the materials that were placed on the lot by the mechanic lien claimants. (Rec. 70, 71, 72.)

Furthermore, there was no evidence that any money represented by any mortgage of the appellants went into the improvements.

The construction of the statute claimed by the appellees, that a mechanic's lien claimant has a prior lien on the enhanced value of the property, made so by his labor or material, regardless of the prior lien upon the land, is in harmony with the spirit of our mechanic's lien legislation and decisions since territorial days. Section 17 of the Act of 1859, provided:

"If the persons who shall have caused the building to be erected has an estate in fee for life, or any less estate, either in law or in equity, or if the land on which the building is erected, at the time of the contract for building or furnishing materials therefor, is mortgaged, or any other lien or encumbrance by contract or

statute, the person who procures the work to be done shall nevertheless be considered the owner to the extent of his right or interest in the land, and the lien hereinbefore provided for by this act shall bind his whole estate or interest therein, and a creditor may cause the right of redemption or whatever other interest or right the owner had in the land, to be sold and applied to the discharge of his debt, according to the provisions of this act."

Under this section, it was held, in *Harsh v. Moran*, 1 Kan. 293, that the mechanic had a lien upon the improvements, erected by a party in possession under an executory contract, but that it was error to sell the land of the fee owner to pay the same.

Sections 14 and 17 of the Act of 1862, were as follows:

"Sec. 14. If the person who procures the work to be done, or material to be furnished, has an estate for life only, or any other estate less than a fee simple, in the land, lot, or lots on which the work is done, or materials furnished, or if such land, lot or lots at the time of making the contract is mortgaged or under any other encumbrance, the person who procures the materials to be furnished or the work to be done, shall nevertheless be considered to be the owner within the meaning of this act to the extent of his right and interest in the premises and the lien herein provided for shall bind his estate and interest therein in like manner as a mortgage would have done, and a creditor may cause the right of redemption, or whatever right or estate such owner had in the land at the time of making the contract, to be sold, and the proceeds of the sale applied according to the provisions of this act.

"Sec. 17. No encumbrance upon the land, lot or lots, created before or after making of a contract under the provisions of this act, shall operate upon the building erected or materials furnished until after the lien in favor of the person doing the work or furnishing the materials shall have been adjusted, and upon questions arising upon previous encumbrances; under the provisions of this act, the previous encumbrances shall be preferred to the extent of the value of the land with-

out such building or appurtenances, and the court shall ascertain by a jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest."

Construing this act, it was held in *Seitz v. U. P. Ry. Co.*, 16 Kan. 134, as follows (2d Par. of the Syllabus):

> "The mechanics lien law of 1862 taken altogether undoubtedly means that a mechanic's lien shall operate upon the whole of the estate which the person procuring the labor and material may have in and to the property for which he procures the same, whatever may be the character of that estate, but such lien cannot operate upon anything more than such estate, and that so far as it does operate, *it is the paramount lien upon the enhanced value given to such estate by the labor and materials. That is, it is the paramount lien upon the surplus value of the estate over and above what would have been the value of such estate without such labor and materials.*"

In *Getto v. Friend*, 46 Kan. 24-30, construing the present statute, it was held that the order of priority should be: As to the *legal estate:* First, the mortgage to Melrose (identical with the $7,500 mortgage to Kimball); Second, the mortgage to Rogers (identical with the $700 mortgage to Rowe); Third, the mortgage to Getto (identical with the $4,500 mortgage to Conklin); Fourth, the mechanics' liens. And upon the *equitable estate* of Peavey: First, the mechanics' liens; Second, the mortgages following them in the order above stated.

If it be true that "on that date (January 3, 1911), Conklin conveyed this property by deed to Charles Bron," then the legal as well as the equitable estate was in Bron when the work was progressing on the morning of January 4th, prior to the execution of the mortgages, and the liens should have been established as in the order last named in *Getto v. Friend.*

It will be noted that Getto's mortgage was a purchase money mortgage, and the *District Court* gave it priority over all liens on the property, but subrogated the Melrose mortgage as a first lien to the extent of the amount due on

the Getto mortgage, because of the agreement that the Melrose mortgage should be a first lien. This was held erroneous, and Getto's mortgage was assigned its true place the same as if the consideration had been other than for the purchase price.

From these decisions of the Supreme Court of the state of Kansas interpreting the statute it is apparent that the mechanic lien holders are entitled to a first lien on the enhanced value of the premises without regard to the question of the priority of the mortgages.

V.

UNDER THE KANSAS STATUTE OF FRAUDS THE ORAL AGREEMENT THAT THE MORTGAGES SHOULD BE EXECUTED AND DELIVERED CONCURRENTLY WITH THE EXECUTION AND DELIVERY OF THE DEED TO THE BANKRUPT AND BE A FIRST AND PRIOR LIEN UPON THE PROPERTY, AND THAT THE KIMBALL MORTGAGE SHOULD BE PRIOR TO THAT OF CONKLIN, WAS VOID AS TO THE APPELLANT MECHANIC LIEN HOLDERS.

As we have pointed out (p. 9 of this brief) the statement of the Court of Appeals that the title to the property did not pass to Bron until 11:40 A. M. January 4th is erroneous. Both the District Court and the Referee found that the property was sold and conveyed to Bron on January 3rd. At that time in any event he was entitled to the possession of the property. The Court of Appeals found that there was a verbal agreement between Kimball, Conklin and Bron that the "mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt and be a first and prior lien upon the property, the Kimball mortgage to be prior to that of Conklin." Under the Kansas Statute of Frauds relating to interests in real estate this oral agreement is absolutely void. Sections 3837 and 3838 of the General Statutes of Kansas, 1909, read as follows:

> "3837. *Leases.*—5. *No* leases, *estates or interests of, in or out of lands*, exceeding one year in duration, *shall at any time hereafter be* assigned or *granted, unless it be by deed or note, in writing*, signed by the

executed at the time of the delivery of the deed. *But aside from this the record fails to show the existence of either of such oral agreements.*

If the Conklin mortgage has priority over the mechanics' liens because it was a purchase money mortgage executed and delivered at the same time as the deed, yet that does not make the Kimball mortgage prior to the mechanics' liens because of the agreement between Kimball and Conklin as to the rank of their mortgages. Conklin could not make a purchase money mortgage of the Kimball mortgage by agreement. If his mortgage is prior to the mechanics' liens, then the priority would be determined under the rule laid down in Malmren *vs.* Phinney, 50 Minn., 457; 52 N. W., 915; 18 L. R. A., 753, which has been followed in other States. (See 3 L. R. A., Extra Annotations, p. 466.) The assignee of the Kimball mortgage would have the first lien to the amount of the Conklin mortgage. The mechanics' liens would be second. The assignees of the Kimball mortgage would be third for the remainder of their mortgage. The Conklin mortgage would be fourth.

Appellants contend that they have priority over both mortgages, and that because the Conklin mortgage was a purchase money mortgage makes no difference, but if it does the judgment of the Circuit Court of Appeals was erroneous in finding that both the Conklin and Kimball mortgages were prior to the mechanics' liens.

The Right of Mechanics' Lien Claimants to Lien upon the Improvements.

The appellants claim that they are entitled to a first lien on the enhanced value of the property created by their improvements. Appellees admit that if the bankrupt Bron had any equitable estate at the time the building was commenced, appellants are entitled to a lien thereon. Appellees say (bottom page 10 of their brief):

"Under circumstances similar to these in this case, that is, where work is commenced without a legal title, the courts have sometimes held that a lien can attach to the equitable title of the one making improvements."

The bankrupt had entered into an agreement on December 22 for the purchase of the property. This is undisputed. Conklin knew the bankrupt was going to erect a building thereon. The bankrupt was not forbidden to enter upon the land. There is absolutely no evidence to that effect. By virtue of the contract he had entered into, he had an interest in the land—an equitable estate. To that equitable estate bankrupt added by virtue of appellants' materials an enhanced value of $13,000.

To this enhanced value the liens of the materialmen attached. The bankrupt was not a mere volunteer.

A case in point is Meyer Bros. Drug Co. *vs.* Brown, 46 Kans., 543. The agreed statement of facts on which that case was submitted to the Supreme Court of Kansas is as follows:

"S. A. Brown & Co. entered into a contract with D. A. Wilson, defendant, in December, 1886, to furnish lumber and materials to erect a building on lots 1, 2, and 3, block 7, Yates's 4th addition to the city of Yates Center, Kans. At the date of said contract G. H. Phillips held the legal title to said lots, which were at that time unimproved; but there was an agreement between said Phillips and D. A. Wilson by which said Phillips was to convey said lots to said D. A. Wilson; that on January 1, 1887, G. H. Phillips and wife conveyed said lots to said D. A. Wilson by warranty deed, and that on January 6, 1887, said D. A. Wilson and wife executed and delivered to Scott & Brier, defendants herein, a mortgage on said lots to secure the payment of $550, for the purpose of obtaining money to pay for the lumber and materials to erect a dwelling on said lots; that S. A. Brown & Co. had, prior to January 1, furnished a portion of said lumber, and work had commenced

old and the separation of the new from the old part would leave the old uninhabitable and would amount to an injury to the freehold, the removal was not permitted. In the instant case, the whole new building belonged to the bankrupt and could be removed without injury to the freehold, but here the equitable estate was perfected into a legal estate. So here, under the appellees' own contention, all they are entitled to is a lien of the purchase-price mortgage of $4,500 on the premises.

Appellees complain, on page 33 of their brief, that no method is provided by statute for the sale, valuation, or appraisement and distribution of a fund arising from the value of the land and the value of the improvements. There is no more difficulty in separating the enhanced value added to the property by the improvements than selling the equitable estate separate and apart from the legal estate. The same method of separation can be applied in one case as in the other.

The Supreme Court of Kansas, under the mechanics' lien laws, has repeatedly, as we have shown, recognized the right of mechanics' liens to attach to the equitable estate separate from the value of the legal estate. It therefore follows that in any view of the case appellants are entitled to a lien on the equitable estate, which in this case is the enhanced value which the improvements gave to the property. Such an interpretation is in accordance with the broad interpretation given to the statute by the Supreme Court of Kansas in order to effect the purpose of its enactment, viz., to protect materialmen and laborers who by looking at the building and the record ascertain that the work of erecting the building was commenced before any mortgages or other liens were filed of record.

The Circuit Court of Appeals held that the work done on January 3 and 4 did not amount to a commencement of the building under the Kansas law.

The case of Thomas *vs.* Mowers, 27 Kas., 265, is decisive of this point. It cites Pennock *vs.* Hoover, 5 Rawle, 290 (*l. c.*), 307, where it is held that it is the first labor done on the ground which is made the foundation of the building, which constitutes the commencement of the building. The case of Pennock *vs.* Hoover is followed in Parrish and Hazard's Appeal, 83 Penn. State, 111, the court holding that the building was commenced the day before the mortgage was filed for record, and thus the mechanics' lien had priority over the mortgage.

CONCLUSION.

Upon conflicting evidence the referee and the district court have found that the property was conveyed to the bankrupt on January 3 and that the work of commencing the building was also begun on January 3. The Circuit Court of Appeals did not refuse to accept the findings of the referee as to the date of the commencement of the building and the conveyance of the property to the bankrupt because it was apparent that a mistake had been made or that there was no evidence to support his findings, but ignored these findings and made its own findings on conflicting testimony. This procedure was not in accordance with the rule announced by this court.

The referee did not find that the bankrupt fraudulently entered upon the premises or entered upon the land before he had a right to do so, but based his decision solely and entirely upon an alleged oral agreement between the bankrupt and Conklin that no work was to be done until Conklin's mortgage was recorded, and stated that the work on January 3 was fraudulently done for the purpose of preferring mechanics' liens over the mortgages. There is no evidence in this case and appellees have been unable to quote any showing that there was any agreement whatever with Kimball (the assignor of the New Hampshire Savings

Bank) in regard to not commencing work before the filing of Kimball's mortgage, but if there was such an oral agreement it would be void, as it was unexecuted until after the rights of the mechanics' lien holders had attached. Therefore the statute of frauds of the State of Kansas would apply to it.

The appellees have studiously avoided reference to the large amount of work which was done on the morning of January 4 after the time appellees admit the deed was delivered to the bankrupt and before the mortgage of Kimball was recorded.

Appellees have attempted to show that this case depends upon a question of fact. It does not. It depends upon a question of law. The referee and district court found that the work was commenced on January 3 and the property was conveyed to the bankrupt on the same day. The stipulation of the parties shows the mortgages were not executed and recorded until January 4. With this state of facts the referee, in order to prefer the mortgagees, stated that the work on January 3 done by the bankrupt was fraudulently done. The district court decided that the motive with which the work was done was immaterial as the mechanics' lien holders had no knowledge of such intent and were not bound by the motive of the bankrupt. The Circuit Court of Appeals took the view of the referee. It is now for this court to say whether materialmen of the States of Kansas and Oklahoma (where the same mechanics' lien law prevails) are to hazard their protection under the mechanics' lien law on the state of mind of the owner when he commences work. This is a question of the utmost importance to the many companies furnishing material in the States of Kansas and Oklahoma. The Circuit Court of Appeals has injected into the Kansas statute an uncertainty which has never before existed. It is for this court to say whether the interpretation of the Circuit Court of Appeals or of the Supreme Court of Kansas shall prevail. We submit that the broad

beneficial terms of the mechanics' lien law shall not be curtailed. We insist that the rights of materialmen shall not be jeopardized by the unknown and unascertainable intent of the owner when he commences the building. With the district court we say that all that is necessary for a mechanics' lien man to investigate before furnishing material is to look at the ground, see that the building has been commenced, investigate the record and ascertain that no mortgages or other liens had been filed of record before the building was commenced.

We therefore ask this court to sustain the finding of the district court, reverse the decree of the Circuit Court of Appeals and direct that the mechanics' liens shall be a first lien upon the property because the building was commenced before the mortgages were recorded and the rights of the mortgagees attached.

Respectfully submitted,

CHESTER I. LONG,
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Solicitors for Appellants.

erty was conveyed on the 3d of January are found in our original brief, commencing on page 9, and we will not stop now to review that testimony.

However, we take exception to that part of the statement of facts found in the second paragraph, on page 2, of appellees' brief as follows:

> "The mortgages were to be executed at the time of the delivery of the deed and before any work was commenced on the building or material furnished; nothing was to be done until the deed and mortgages were recorded. (Referee's Certificate, Transcript, page 10.) (Transcript, pages 48 and 78.)"

There is absolutely nothing in the certificate of the referee which supports any such statement, and the evidence found on pages 48 and 78 of the transcript is set out in appellees' brief at pages 9 and 10. We shall take this matter up later and prove that the foregoing extract has no support either in the findings of the referee or any evidence in the record.

The statements found on page 4 of appellees' brief to the effect that the closing of all transactions took place on the forenoon of January 4, 1913, and that Bron fraudulently entered upon the property and did work on January 3 prior to a time when he had a right to enter upon the lands is contrary to the finding of the referee and the district court, as we have pointed out in our original brief commencing on page 9.

On pages 6 and 7 of their brief appellees contend that inasmuch as the referee and the district court found the title to the property was conveyed on January 3, and that on the same date the deed and the mortgages were recorded, the referee must have meant that all the acts took place on January 4, because on that date by stipulation of the parties it was agreed that the deed and mortgages were recorded. However, on page 8, appellees admit there was a direct conflict of the testimony between Bron and Conklin as to when the deed was delivered. Bron insisted that it was on Jan-

uary 3, and Conklin declared that he did not remember of the deed (which was duly executed and acknowledged on the 3d) being out of his possession on the 3d or turning it over to Bron on that day (Trans., 81, 82). The referee and the district court, as we have pointed out, found that the deed was delivered on January 3. Under the rule of this court this finding of fact on conflicting evidence must stand, and this court will accept January 3 as the date of conveyance. Inasmuch as the express stipulation of the parties shows the mortgages were not recorded until the 4th, the finding of the referee, being wholly unsupported by the evidence, must be set aside in this respect. There is nothing inconsistent in the attitude of the appellants in this respect. The finding of the referee approved by the district court must be accepted, except where it is clearly shown that the finding is totally unsupported by the evidence. We have a right therefore to show the stipulation in respect to the date of the recording of the mortgages. Appellees admit that there was a conflict as to the date of delivery; therefore the date found by the referee and approved by the district court, to wit, January 3, must be sustained.

There was no dispute before the referee as to the date of the execution and recording of the mortgages. This was stipulated. No evidence was introduced on the subject. There was, however, a very spirited dispute as to the date of the delivery of the deed and conveyance to the bankrupt and as to when the work of commencing the building was done. Evidence was presented to the referee at length on these points. On the one hand the appellants contended that the work was commenced on the 3d and the deed was delivered on the 3d. The appellees contended there was no work done on the 3d and no conveyance made on that date. Thus the 3d was impressed upon the referee's mind as the date of the conveyance of the property and the commencement of the work. He found that the conveyance to the bankrupt was made on the 3d, and also that the work was commenced on that date. The referee evidently recognized that there

The cases cited by appellees on pages 11, 12, and 13 we have discussed in our original brief.

We wish to correct a statement of appellees at the bottom of page 14 of their brief "that the contract under the mechanics' lien law must be made with the owner, who, until January 4, was Conklin, not Bron." As we have already established, the property was conveyed to Bron on January 3. It is not the recording of the deed which controls. The mechanics' lien attaches to whatever interest the contracting party has in the land at the time the work is commenced. Unlike the mortgage it is immaterial whether the deed was of record. This is established by the case of Lang *vs.* Adams, 71 Kan., 311, quoted from at page 32 of appellees' brief. There it was said that the owner of record does not control, but the *actual* owner of the interest in the property. Appellees admit, on page 10, that the lien might attach to the equitable title of one making the improvements. Bron had the legal title as well as the equitable title on January 3. The fact that the record did not show he was owner is immaterial, but the mortgages had no rights superior to the mechanics' liens under the Kansas recording act until they were placed of record (Jackson *vs.* Reid, 30 Kans., 10).

In this connection we wish to quote correctly the act set out on page 32 of appellees' brief:

> "No such instrument in writing shall be valid except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record" (section 1672, General Statutes of Kansas, 1909).

He got the equitable title on December 22, 1910, when Conklin, the agent of the owner, admits the agreement was made for the lots (Trans., p. 78). This would have supported a lien on the equitable estate under the Kansas law, even though a deed had not been made to Bron.

Appellees contend that a mechanics' lien holder is not an *innocent purchaser for value* under this act. He does *not*

have to be because the act specifically provides that the unrecorded mortgages *shall not be valid* except as between the parties thereto and parties having actual notice thereof. There is nothing in the statute about being an innocent purchaser for value. In support of their contention appellees cite cases from Wisconsin and Iowa. By reference to the text of the cases cited it will be seen that the Iowa statute reads:

> "No instrument affecting real estate is of any validity against SUBSEQUENT *purchasers for a valuable consideration*, without notice, unless recorded in the office of the recorder in the county in which the land lies, as hereinafter provided."

The statute of Wisconsin is set out in the case of Mathwig *vs.* Mann, 65 Am. St. Rep., 47 (Wis.), (cited by appellees in support of their contention) in these words:

> "The only effect of such failure of Mann to record his mortgages for three days after they were executed and delivered to him was the liability of having the same become 'void as against any *subsequent purchaser in good faith, and for a valuable consideration*, of the same real estate or any portion thereof, whose conveyance should first be duly recorded.' (Rev. Stats., sec. 2241.)"

It is thus seen that the cases cited under such statutes have no application to the Kansas law, which is totally different and makes the instrument void unless recorded regardless of whether or not the third parties are innocent purchasers for value. The mortgages until recorded were void against parties, such as the mechanics' lien holders, who advanced value to the bankrupt in reliance on the record at the time the building was commenced.

The case of Mortgage Company *vs.* Winter, 94 Kans., 615, quoted from by appellees in their brief on page 17 and again cited on page 30 is not in point. The second syllabus (written by the court as the law of the case) reads:

> "A mortgage given at the time of the purchase of the mortgaged land by the mortgagor, to obtain the money used by him to pay the price, and thereby procure the deed, has priority over a deed made by the mortgagor at a time when he had no title, to a *grantee who knew of the negotiations for the mortgage and had agreed to take the property subject to it* although the only reference to the mortgage in the deed is in an exception to the warranty of title."

A very different rule applies where the party claiming the lien agreed that the mortgage might be prior to his interest than that which applies where the lien claimant had no knowledge of the mortgage until after his own lien attached. The case of Russell *vs.* Grant, 43 Am. St. Rep., 563 (page 16, Appellees' Brief), and the cases cited in connection with it have to do with purchase money mortgages, as do the cases cited under the heading "Purchase Money Mortgage," extending from page 17 of appellees' brief to page 25, inclusive. The same is to be said of the cases cited at the top of page 29 of appellees' brief. These decisions have no bearing on the question of the Kimball mortgage of $7,500, as it was not a purchase-price money mortgage.

We insist that this case is to be decided on the Kansas statutes as interpreted by the Supreme Court of Kansas and not by the decisions of other States based upon entirely different statutes. Decisions from other States are not controlling and are of but little value, owing to the diversity of the recording acts and mechanics' lien laws. The mechanics' lien act is to be liberally construed in order to protect materialmen and laborers. This is the pronouncement of the Supreme Court of Kansas in Wallpaper Company *vs.* Perkins, 90 Kans., 727, where it is said:

> "It may be premised that the mechanics' lien law of this State is not, like similar laws in some other States, construed strictly because in supposed derogation of the common law. The law is framed on broad principles of justice and equity which would call for a liberal interpretation in the absence of a statutory

rule governing the matter. (Deatherage *vs.* Henderson, 43 Kans., 684, 690; 23 Pac., 1059; Lumber Co. *vs.* McCurley, 84 Kans., 751; 115 Pac., 590; Lumber Co. *vs.* Douglas, 89 Kans., 308, 316; 131 Pac., 563.) But besides this, the legislature has prescribed a rule which reads as follows:

"'The rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State, but all such statutes shall be liberally construed to promote their object.' (Gen. Stat., 1909, #9850)."

The New Hampshire Savings Bank Mortgage.

The $7,500 mortgage of the New Hampshire Savings Bank which was originally given to Kimball is admittedly not a purchase-price mortgage. Whatever right the New Hampshire Savings Bank can claim arises from one of two things:

First. That there was an oral contract with the bankrupt Bron that it was to be recorded at the same time that the deed was executed and delivered, or,

Second. That there was an oral agreement between bankrupt Bron and Kimball that no work was to be done on the premises until the $7,500 mortgage was recorded.

The Kimball mortgage must stand on one or the other of these propositions. It cannot be based on the fact that it was a purchase-price money mortgage, because it was not. It cannot be contended that the delivery of the deed and the giving back of the mortgage were one and the same transaction so far as the Kimball mortgage was concerned, because Kimball had nothing to do with the giving of the deed. Such is treated as one transaction, if at all, only when a deed is given and a purchase-price money mortgage is taken. Not one cent of the Kimball mortgage of $7,500 went to pay for the land. If the fact that the Kimball mort-

gage was recorded ten minutes before the Conklin mortgage made the Kimball mortgage superior to the Conklin mortgage, then the fact that the deed to Bron was, according to appellees' contention, delivered at 11 and recorded at 11:40 a. m. (more than thirty minutes before the Kimball mortgage was recorded), shows that for thirty minutes Bron had an unencumbered title, so far as the Kimball mortgage was concerned, and during that thirty minutes work was being done on the premises. Not only had the building been commenced on January 3, but work of a very substantial nature was being done toward the erection of the building all the morning of January 4. (See our Original Brief, pages 3, 12.) Appellees have totally ignored the work done toward the excavation for the foundation on the morning of January 4. It is therefore apparent that by reason of the commencement of the building on January 3 and the work done on the morning of January 4 the rights of the lien holders attached, even under the state of facts contended for by the appellees, at the time of the delivery of the deed to Bron at 11 o'clock and prior to the recording of the Kimball mortgage of $7,500 at 12 p. m. So the Kimball mortgage, not being a purchase-price mortgage, must depend for its priority, if at all, upon some agreement that the bankrupt had with Kimball, which agreement could not affect the rights of the mechanics' lien holders.

Now, the record in this case does not disclose any agreement between Kimball and the bankrupt Bron as to the commencing of the work or the delivery of the deed and recording of the mortgage. There is absolutely no evidence in the record as to either sort of an agreement between Kimball and Bron. Appellees have failed to show any such evidence, but even had there been such an oral agreement with Kimball it was void as to the mechanics' lien holders under the statute of frauds of Kansas. (See our Original Brief, page 29.)

Appellees, on page 36 of their brief, attempt to avoid the effect of the statute of frauds of Kansas by saying that it

does not apply to an executed contract, but these oral agreements, if any, were not executed contracts at the time the mechanics' lien holders' rights attached. At the time of the delivery of Conklin's deed to Bron, Kimball had done nothing to perform his side of the contract. He had not paid the money to the bankrupt Bron, and it was only the execution of the contract by Kimball which would have prevented the statute of frauds from applying. We wish to call attention to a very recent case by the Supreme Court of Kansas in point. In Banister *vs.* Fallis, 85 Kansas, 320, a written contract had been made for the exchange of land, each party to furnish an abstract showing a perfect title to his land. The parties met at the bank to close the deal when a supposed defect in the title to the Fallis land was discovered. An oral agreement was made that all papers should be left in the bank until the supposed defect in the title was cured. Fallis orally agreed to obtain a quit claim deed curing the alleged defect. The deeds were recorded by some one other than the plaintiff Banister, who brought suit to cancel the deeds on the ground that Fallis had not complied with the contract. The Supreme Court of Kansas decided:

> "An oral agreement between a vendor and a vendee of land which arrests consummation of the written contract between them until the vendor procures a deed to cure a supposed defect in his title, which deed the vendor promised to obtain, is unenforceable under the statute of frauds."

So here the alleged oral agreements, if any were made, were void and unenforceable. It is upon the enforcement of such oral agreements that the priority of the Kimball mortgage must rest. Unless the assignee of the Kimball mortgage can enforce the purported oral agreement, that mortgage is subsequent to the mechanics' liens which attached, at the latest, immediately upon the delivery of the deed. As to the Kimball mortgage, the oral agreements were not

IN THE

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_____TERM, 1916.

No. 264.

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY,
Appellants,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN,
Appellees.

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THE JACKSON-WALKER COAL & MATERIAL COMPANY,
Appellant,

vs.

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Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS ON BEHALF OF APPELLEES.

THE statement of facts by the appellants is incorrect as to the date the deed was delivered to Bron. The Referee's finding shows that January 3rd was an error, from the balance of the findings, and that January 4th was the date intended. The facts, stipulations and findings appear in the transcript and will be referred to in the brief.

The findings of the Referee show that the deed and mortgages were delivered at the same time (Transcript, page 9), and all recorded by E. D. Kimball. (Transcript, pages 97 and 78, *reference to Sargent.*)

Pursuant to certain oral negotiations, about December 20th, 1910, Bron and Conklin negotiated regarding a sale, and it was orally agreed as follows: That the property was to be sold to Bron, a $4500.00 purchase money mortgage was to be taken back, to be subject to a $7500.00 mortgage thereafter to be executed, on which Bron was to borrow funds with which to build a building on the lots. The mortgages were to be executed at the time of the delivery of the deed and before any work was commenced on the building or material furnished; nothing was to be done until the deed and mortgages were recorded. (Referee's certificate, Transcript, page 10.) (Transcript, pages 48 and 78.)

The Referee established the mortgage liens of the appellees as a first lien.

The United States District Court reversed the order of the Referee and established the liens of the mechanic's lien holders over the mortgages of the appellees herein.

A.

The finding of the Referee as to the facts, that prior to the execution of the deed and mortgages Conklin was the owner of and occupied as a homestead the property in question, the subject matter of this controversy. (Transcript, page 9.)

B.

On January 4th, 1911, Conklin conveyed this property by deed to Bron, the bankrupt, and received in payment a mortgage for $4500.00, which it was agreed between Bron and Conklin should be a second lien to the mortgage of $7500.00, which was to be, and was, on that date executed by the bankrupt to E. D. Kimball.

C.

This $7500.00 mortgage was afterwards endorsed and assigned to the appellee, The New Hampshire Savings Bank.

D.

The deed to Bron and both mortgages were filed for record on January 4th, 1911.

E.

At an early hour on January 3rd, 1911, the bankrupt entered upon the premises with laborers and did an hour or two's work toward the excavation of the foundation for the building to be erected on the land. Subsequently, various parties furnished labor and material in and about the erection of improvements, for which they filed mechanic's liens.

F.

The property was ordered sold, free from liens, and the liens transferred to the funds to arise from the sale of the property.

G.

The deed to Bron was delivered to Kimball by Conklin and filed for record by Kimball, and all said instruments were filed at the same time that any work was done prior to January 4th, 1911, the instruments all being filed at noon of said date. (Transcript, pages 12 and 13.)

H.

There was a stipulation in the case (Transcript, page 12) between the parties, by which stipulation it was admitted that Laura Conklin received a deed for this property on March 22nd, 1897, filed for record on April 4th, 1902; and that Laura Conklin and husband signed a deed, dated December 31st, 1910, for a consideration of $4500.00, which deed was signed and acknowledged on January 3rd, 1911, and which was filed for record January 4th, 1911, at 11:40 o'clock A. M. of said day, which transferred the property from Laura Conklin and husband to the bankrupt, Bron.

2. By the stipulation it was also agreed that Charles Bron and wife executed to E. D. Kimball a mortgage for $7500.00, dated January 3rd, 1911, acknowledged January 4th, 1911, and filed for record January 4th, 1911, at 12:10 o'clock P. M., covering the same property mentioned in the deed to Bron.

3. It was also stipulated that the bankrupt and his wife executed to P. J. Conklin a mortgage for $4500.00, which appears to be dated December 31st, 1910, acknowledged January 4th, 1911, and filed for record January 4th, 1911, at 12:30 o'clock P. M. The said mortgage of $4500.00

from the bankrupt Bron to Conklin excepts a mortgage of $7500.00, dated January 3rd, 1911, executed to E. D. Kimball, and being the mortgage now owned by the appellee, The New Hampshire Savings Bank.

The facts are that Conklin owned the property; that Bron negotiated for the purchase; that Bron obtained a $7500.00 mortgage on the property from Kimball; that Conklin was to have a $4500.00 mortgage, which was to be inferior to the mortgage of $7500.00. The final closing of all transactions was in the forenoon of January 4th, 1911.

The Referee found (Transcript, page 10) that at an early hour on January 3rd, 1911, Bron fraudulently entered on the premises and did an hour or two's work. This was prior to the time that the bankrupt received his deed and prior to the time the mortgages had been delivered, and prior to Bron's right to enter upon the land.

The District Court (Transcript, pages 125 and 128) adopted the findings of the Referee as to the facts, but disagreed with the Referee as to the conclusions that follow from the facts.

The District Court adopted the findings of the Referee (Transcript, page 126) that the conveyance of the property from Conklin to Bron, and the mortgages to Conklin and Kimball, were all executed and delivered and filed for record at the same time.

ARGUMENT.

Before replying to the brief of the appellants in this case, the appellees state their claim that The New Hampshire Savings Bank is entitled to a first lien, and P. J. Conklin is entitled to a second lien, on the proceeds in the hands of the Trustee.

SECOND.

A purchase money mortgage is prior to any right of anyone who claims by or through Bron, where all the instruments are delivered at the same time.

THIRD.

Any work done by Bron prior to the time that he obtained the deed, or was entitled to his deed, cannot prejudice the rights of the appellees.

FOURTH.

The deed to Bron was delivered to Kimball by Conklin, filed for record, and all instruments were filed at the same time, and all work done prior to January 4th, 1911, at noon, was done before Bron had any right or title or any right of possession of the land.

FIFTH.

Anyone who claims a right superior to Conklin and The New Hampshire Savings Bank must not only show that Bron had a deed, but had a lawful right to commence work, with the knowledge and consent of Conklin and Kimball.

SIXTH.

The deed and mortgages, being all filed for record at the same time, prove that this is one transaction.

SEVENTH.

A mechanic's lien claimant is not a *bona fide* purchaser, protected by the recording acts of Kansas.

EIGHTH.

The rights of all the parties hereto hinge on the question as to the date of the delivery of the deed and the mortgages and the contracts of the parties under the agreements made.

NINTH.

A purchase money mortgage cannot be displaced by any act of the vendee, or anyone claiming under him.

FIRST.

THE PROPERTY IN CONTROVERSY WAS CONVEYED TO THE BANKRUPT ON JANUARY 3, 1911, AND THE WORK OF EXCAVATING FOR THE FOUNDATION WAS BEGUN ON JANUARY 3, 1911, AND CONTINUED ON THE MORN- OF JANUARY 4, 1911.

APPELLEE'S CONTENTION:

The property in controversy was conveyed to the bankrupt on January 4, 1911. Any excavation for foundation on January 3, was prior to the time that bankrupt had any right, title or interest in the premises, and if mechanic's liens could attach they could attach only to such title as the bankrupt was to have under the contract of sale.

The Referee's certificate shows that the deed and mortgages were all executed and delivered as conveyances of title on the same date. He states this date to be January 3rd, 1911. His findings is as follows:

> "Prior to January 3rd, 1911, the creditor Conklin was the owner of, and occupied as his homestead, the following-described property:" . . .
>
> "On that date Conklin conveyed this property by deed to Charles Bron, the bankrupt, in payment for which he received a mortgage from Bron for $4500.00, which, it was agreed between the parties, should be a second lien to a mortgage of $7500.00 *which was to be and was executed on that day* by Bron to E. D. Kimball, and which was afterwards assigned to The New Hampshire Savings Bank and by it presented in this estate. The deed and both these mortgages were duly recorded on the 3rd day of January, 1911." (Transcript, 9.)

The District Court after a review of this matter in its memoranda of opinion approves this finding, and states:

> "That the conveyance of the property from Conklin to bankrupt, and the mortgages made by the bankrupt, were all executed and filed for record on the same day." (Transcript, 126.)

The appellants accept these findings as to the date January 3rd, but discredit that part of the findings which states that the transaction occurred on the same date. They do this by referring to the stipulation of parties in the trial of the matter, which shows that it was January 4th instead of January 3rd when the instruments were recorded. It is evident that the Referee and the District Court erred in the date, but it is also evident that the ultimate fact which they intended to find was that the deed and mortgages were delivered on the same day, whatever that date was, and not that the date necessarily was January 3rd in place of January 4th. The date is only of significance in this matter in determining when these acts occurred, that is, to show that the delivery of the deed and the execution of the mortgages were on different days, to wit: January 3rd and January 4th. The Referee and the District Court in their findings settled the fact that it was on the same day, be that January 3rd or January 4th.

The appellants realize that to make any feasible contention in this matter it is necessary to create an interim between the delivery of the deed and the delivery and execution of the mortgages. This interim is the basis for the contention that the building was commenced by the surreptitious excavation upon the foundation while the bankrupt had title through the deed and before the mortgages were executed.

To create this interim they accept the findings of the Referee and of the District Court as to the date of January 3rd, arguing that the finding of the lower court should always be accepted, but in the same breath request that the findings of the Referee and District Court should be discredited because by stipulation of parties the date of the execution and recording of the mortgages is fixed at January 4th. In this connection it should be noted that the Referee, in the second paragraph of the finding quoted, specifically found that the agreement of Bron and Conklin

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

KOS HARRIS,
V. HARRIS,
R. L. HOLMES,
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CRANE & CO., TOPEKA

SUBJECT INDEX.

CASES CITED.

KANSAS CASES CONCERNING MECHANIC'S LIEN STATUTES.

CASES FROM OTHER STATES.

session to go on the land and work, not one who has no title, nor right of title, nor possession to the land. No one claims that Conklin or Kimball knew that anyone was doing any work on January 3rd or 4th.

See *Lang v. Adams*, 71 Kansas, 311, lower third of page, and page 312.

Appellants, to obtain any benefit from any Kansas case, must show title, either legal or equitable, and right of possession, and a lien originating after such work has been commenced.

In the case of *Russell v. Grant*, 43 Am. St. Rep. 563 (Mo.), it is said:

> "A purchase money mortgage may not be postponed to a mechanic's lien for material furnished, when the deed and mortgage were made and delivered at the same time."

To the same effect, see:

1st Jones on Mortgages, Section 158.
United States v. New Orleans, 12 Wallace, 362.
Lumber Company v. Schweiter, 45 Kansas, 207.
Getto v. Friend, 46 Kansas, 24.
Missouri Valley v. Reed, 45 Pac. 722.

Every Kansas case cited by appellants to sustain their contention goes off on the following propositions:

A.

That a purchaser was in possession peaceably, with the consent and knowldge of the vendor.

In the case of *White v. Kincade*, 95 Kansas, 469, after stating that a vendor who induces a purchaser to expend labor and material, cannot defeat claims, the court says:

> "A different rule would apply if there was no consent or authority for the improvement to be made by the vendor, or owner of the property."

See—

Monroe v. West, 29 Am. Dec. 524.
Galbraith v. Davidson, 99 Am. Dec. 233.

This is the rule in the case at bar.

B.

That the lien attempted to be enforced was confessedly subsequent in origin to the point of time of the commencement of the building, as in the case of *Nixon v. Lodge*, 56 Kansas, 304.

The entire argument of the appellants is based on the commencement on the 3rd day of January, 1911, as the origin of Bron's title and the commencement of the work. Appellees assert that the decision of the three tribunals, the Referee, the District Court, and the Circuit Court of Appeals, all unite in the fact that the deed and mortgages were all delivered at the same instant of time, and were a part and parcel of one transaction.

In the case of *Mortgage Co. v. Winters*, 94 Kansas, 619, 620, it is said:

> "The delivery of the deed by Winters, before he had title, would have bound him by an equitable estoppel, but by this principle Leban could only get from Winters what Winters, himself, had obtained, and never, for a single instant, had the title stood in subjection to the mortgage. The mortgage was one for purchase money essentially. One who executes a purchase money mortgage is not regarded as obtaining the title and then placing an encumbrance thereon. He is deemed to take the title charged with the encumbrance, which ha. priority even over pre-existing claims, and a mortgage given to a third party to obtain money used in buying property is entitled to the same preference."

The priority of a purchase money mortgage to other liens, created before the execution, rests upon the doctrine that the deed from the vendor and mortgagee are parts and parcels of a single transaction; and germane to this idea we cite the cases under the head of purchase money mortgages, as follows:

PURCHASE MONEY MORTGAGE.

In the case of *Boies v. Benham*, 14 L. R. A. 55, and the cases cited in the notes, it is said:

> "A purchase money mortgage is held superior to another mortgage executed by the vendee."

In the case of *Anglo v. Campbell*, District of Columbia, Court of Appeals, 43 L. R. A. 622, a duly recorded mortgage for money advanced on a building was held to be prior to mechanic's lien holders and that no trust was imposed on the funds in favor of such mechanic's lien holder.

The case of *Turk v. Funk*, 68 Mo. 18, holds a mortgage for purchase money is prior to a mortgage given by the mortgagor to procure money for a cash payment, which last mortgage was executed before the title passed to the mortgagor.

And as bearing out the same point, see

Kaeiser v. Lembeck, 55 Iowa, 240.
Brower v. Witmeyer, 121 Ind. 83.
Laidley v. Aiken, 80 Iowa, 112.
Demeter v. Wilcox, 115 Mo. 422.
Stewart v. Smith, 1 Am. St. Rep. 651 (Minn.).
Wimberly v. Mayberry, 14 L. R. A. 305 (Ala.).

This last case cites the Alabama statute, which gives a lien upon improvements prior to the mortgage. Attention is called to the dissenting opinion at page 313.

However, this Alabama statute does not go as far as the District Court went in the case at bar without any statute.

The notes to this last case cite many cases to the following proposition:

A. A mechanic's lien is inferior to a prior mortgage. (Page 305.)
B. A statute that attempts to displace a prior mortgage in favor of mechanic's liens is void. (Pages 305-306.)
There are statutes referred to as giving a lien on buildings prior to mortgages, and the court below adopted a rule as though there was a statute.
C. Purchase money mortgages are prior to mechanic's liens, though the work is done before the mortgage is recorded. (Page 307.)

In the case of *Payne v. Wilson*, 74 N. Y. 348, it was held:

> "An agreement to make a mortgage, which was defectively executed, and subsequently cured and re-

corded, but not until a mechanic's lien was filed, was an equitable lien prior to the mechanic's lien."

In the same case it is held:

"The principles which give a mortgage a lien prior to a judgment creditor apply to a mechanic's lien holder."

See notes to 39 L. R. A. 84, as to the rights of the mortgagee and ownership, in connection with the Allis-Chalmers case.

In the case of *Miller v. Stoddard*, 16 L. R. A. 288 (Minn.), it is held:

"Unless there be an equitable estoppel, a mortgage is ahead of a mechanic's lien."

There is little difference, if any, between the Kansas and Minnesota statute as to mechanic's liens.

In the case of *Smith v. Wilkins*, 64 Pac. 760, a mortgage substantially in the condition of the appellees' mortgages was held prior to a mechanic's lien, citing the case of *Missouri Valley v. Reed*, 45 Pac. 722.

In the case of *Shearer v. Cummings*, 16 S. W. 37 (Texas), it was held:

"The commencement of a building without consent of the land owner does not entitle a mechanic's lien holder to a lien."

In the case of *Henry v. Coatswark*, 79 N. W. 616, it is held:

"A mechanic's lien is inferior to a mortgage, where the money was loaned to improve the land,"

and the same rule is adopted in *Chaffee v. Chested* (Nebr.), 96 N. W. 161.

In the case of *Rockford v. Rockford* (Mass.), 74 N. E. 299, it is held:

"Where a purchaser makes a contract before acquiring title, the rights of the mechanic's lien holder will be inferior to the purchase money mortgage."

The case of *Pickens v. Plattsmouth*, 59 N. W. 947 (Nebr.), holds:

> "A vendor of land is not postponed to a mechanic's lien, unless the lien holder had a contract with the vendor, or someone thereunto duly authorized, to act for him."

In the case of *Johnson v. Spencer*, 96 N. E. 104 (Nebr.), it was held:

> "An interloper cannot create a lien on land against the real owner of the property."

See also *McGuire v. Federal Mortgage Co.*, 141 S. W. 467.

In the case of *Marin v. Knox* (Minn.), 136 N. W. 15, it is held:

> "Deeds and mortgages executed on the same day are as one transaction, and thereby are ahead of a judgment lien against the vendee, and the same rule applies to a mechanic's lien."

In this last case there was a deed; a mortgage was executed to the vendor, and a mortgage was aso executed to a third party, which by agreement was to go ahead of the mortgage of the vendor.

In the case of *Strong v. Vandeusen*, 23 N. J. Eq. 369, it was held that a purchase money mortgage had a preference over a lien for work and materials put on the property by a contract with the purchaser before the execution of the contract of purchase and the conveyance.

In the case of *Hoagland v. Lowe*, 58 N. W. 197 (Nebr.), it was held:

> "The fact that the vendor agreed that the purchase price mortgage should be subordinate to one given by the purchaser to obtain money with which to erect a building, did not render it subordinate to a mechanic's lien."

In the case of *Gibbs v. Grand*, 29 N. J. Eq. 419, it was held:

> "A purchase money mortgage, subsequently executed by a vendee after acquiring title, when at the

time he did not have any consent from the owner to erect a building, was paramount to a mechanic's lien."

The case of *Reis v. Ludington*, 13 Wisc. 276, holds:

"A mechanic's lien, which by statute is prior to any lien originating subsequent to the commencement of the building, is not prior to a mortgage executed before and not recorded until after the construction is commenced."

See *Butler v. Bank*, 94 Wisc. 351.

In the case of *Johnson v. Rawles*, 58 N. W. 132, it was held:

"A mechanic's lien cannot be established by one who contracted with the vendee before the vendee acquired title and who obtained possession without right from the vendor."

To the same point, see *Pinkerton v. Lebau*, 54 N. W. 97, S. D.

The case of *Holmes v. Hutchinson*, 57 N. W. 514 (Nebr.), holds:

"The vendor's knowledge of the intention of the vendee to make improvements on the property does not postpone a purchase money mortgage to a mechanic's lien for improvements."

In the case of *Fletcher v. Kelly* (Iowa), 21 L. R. A. 347, it is held:

"A mechanic's lien holder is not a purchaser within the meaning of the statute, which requires mortgages to be recorded in order to be valid against the purchaser for value."

In 34 Cent. Dig. under head of Mechanic's Liens, column 2088, Section 5, the following text is sustained by authorities from ten different states:

"A statute which creates a mechanic's lien, being in derogation of the common law, must be strictly construed, and a strict compliance with the statutory requirements must be shown to establish a lien."

was that both mortgages were to be executed on the day of the delivery of the deed, and that they were actually executed on the day of the delivery of the deed. If it could be said that there is such inconsistency in the finding of the Referee that it cannot be accepted, then the weight of the testimony shows that the delivery of the deed and mortgages occurred at the same time.

The bankrupt Bron testified that the deed was delivered January 3rd (Transcript, 45) and the mortgages were executed January 4th. (Transcript, 47.) He also stated that the contract was that the mortgages were to be executed when the deed was delivered. (Transcript, 48.)

P. J. Conklin, who made the deal with Bron, testified that the contract was that the deed and mortgages were to be executed at the same time (Transcript, 78), and he testified that the deed was not delivered until January 4th, when the mortgages were executed. (Transcript, 78.)

There is, then, this direct conflict in the testimony. It is appellees' contention that it would be out of the ordinary for the terms of the contract not to be carried out; that it would be unusual that a man should give up his deed before he received back his purchase money mortgage, especially when the entire purchase price was to be represented by a purchase money mortgage. Bron suggests no reason why he received this deed before he was required to execute the mortgage. He merely says the deed was delivered January 3rd. Certainly the probabilities are in favor of Conklin's testimony, and the ordinary conduct of individuals in a situation of this kind would also substantiate his statement.

The Circuit Court of Appeals accepted the view of the appellees as herein stated, that is, that the Referee found that the deed and mortgages were executed and delivered on the same date, and that that date was January 4th. The Court of Appeals saw that the Referee had probably made a clerical error in the date, and in its opinion corrected this date. The appellants severely criticise the Court of Appeals for this. However, to substantiate this criticism they rely on excerpts and selected sentences from the findings of the Referee and from the opinion of the District Court. A line or two more of the Referee's certificate and the District Court's opinion taken from the same place from which these quotations are made, would have disclosed the fallacy and unfairness of their criticism.

The Referee found that the bankrupt, before the delivery or execution of the deed and mortgages, fraudulently started the work on the building, that is, by doing an hour or two's work on the excavation of the foundation. It was fraudulently done because it was in violation of the understanding of the parties and without the knowledge of the grantor in the deed. On the strength of this commencement of the building, it is contended that the materialmen's liens are superior to the mortgages because they preceded the execution of the mortgages. The fallacy of this position lies in its attempt to fasten liens upon that part of the title which the bankrupt never had or never would have had except by paying off the mortgages. The negotiations in the deal, or the preliminary contract, which was oral, provided that Bron was to have a conveyance of this title; that he was to put a first mortgage of $7500.00 upon the property, presumably to furnish a building fund, and then he was to give a second mortgage to Conklin of $4500.00, which was to be a purchase money mortgage, and that the deed and mortgages were all to be executed and delivered at the same time.

Bron's testimony as to the contract was as follows:

> "Q. You gave the mortgage back for the purchase money at the time you gave the deed? A. I gave him a mortgage back for the lots at the time he gave the deed.
>
> Q. That was the understanding? A. That was the understanding, that I should give him a mortgage back for the purchase money.
>
> Q. At the time you gave him the deed? A. No; he didn't say anything about the time.
>
> Q. How much of a mortgage did he say you would agree to be ahead of it? A. $7500.
>
> Q. That was the amount he was to have ahead of his mortgage? A. Yes.
>
> Q. You was to give him a mortgage for the purchase money when he gave you a deed, subject to the $7500? A. Yes.
>
> Q. That was the contract? A. Yes, sir." (Transcript, 48.)

Conklin's testimony as to the contract was as follows:

> "A. I was to take a second mortgage back on the

property. I was to get $4500 for the property if it was paid within a year. Then I was to accept in payment a second mortgage subject to a mortgage of $7500; and when the conversation came up I told Mr. Bron that when that deal was made we would have to have out (our) mortgage that he was to give back for the purchase price, we would have to have that as a first—a prior—before any work commenced, that no work should be done on that flats at all, nothing should be done until out (our) mortgages was of record.

Q. State whether or not you were to have a lien second to $7500. A. Yes, sir.

Q. Was that the—was any change in the terms of that agreement after that before the deal was closed? A. No, sir." (Transcript, 78.)

From this it must be evident that after the deal was finally consummated the interest or title which Bron would have in this property would be the title over and above the two mortgages which were to be executed as part of the transaction. He certainly could not get the legal title without executing the purchase money mortgage, and it is not reasonable that Conklin would take a purchase money mortgage for the entire price of the property unless Bron could borrow the money and make the first mortgage to improve it.

The result of appellants' contention in this matter would be that Bron, by not obtaining any legal title at all, or by failure to consummate the deal as agreed upon, obtains a greater right or interest than he would have had if he had carried out the deal as he agreed. The statement of the proposition shows its fallacy.

Under circumstances similar to these in this case, that is, where work is commenced without a legal title, the courts have sometimes held that a lien can attach to the equitable title of the one making improvements. Just what is meant by the equitable title is not always clear, but presumably it is that title or interest which might be the basis for an action for specific performance, or that element of the title based upon possession with the right to build either by express or implied contract which the builder would have if he carried out his contract with the owner of the legal title. Under no circumstances could mechanic's liens or material-

men's liens attach to any greater interest or estate than the person had who was doing the building. There is no reason why the building of the improvements should enlarge his estate. The courts have without exception held that liens cannot attach to any greater interest than the builder, or the owner of the title making the improvements, owns.

In this case after the deal was consummated liens could attach only to the estate which Bron had, which would be that part of the title over and above the mortgages. Before the deal was consummated, if it could be said that Bron had sufficient title to start building so that liens could attach, they could attach only to the title which he then had or would have if he carried out the contract. If he had any equitable title it would only be that title which a court of equity would give to him by his complying with all of the requirements of the contract. Bron could only lay claim to the title over and above the mortgages before the deal was consummated, and therefore mechanic's liens which were the result of his building could only attach to the same interest, be it before the deal was consummated or after.

The rule of law controlling in a situation of the kind in question is stated in the opinion of the case of *Sietz v. U. P. Ry. Co.*, 16 Kans. 133, at page 141, as follows:

> "In the present case Mrs. Bickerdyke had a contingent equitable estate in the property in question. The plaintiff had all the rest of the estate. Upon this contingent equitable estate of Mrs. Bickerdyke the defendants' liens operated, and upon that they were the paramount lien to the extent above mentioned; but they operated upon nothing more. They could not operate upon anything more. They could not reach something that Mrs. Bickerdyke did not have. They could not reach to the plaintiff's legal estate itself. A stream cannot rise higher than its fountain. And therefore, we think that said liens did not in any manner affect the legal estate of the plaintiff, or its rights thereunder."

The facts of the instant case have virtually been passed upon by the Supreme Court of the State of Kansas in the case of *Getto v. Friend*, 46 Kansas, 24. In that case one Getto owned a lot. He sold this lot to one Peavey for the

sum of $1150.00, Peavey paying $50.00 down, and agreed to give his note and mortgage for the balance as a purchase money mortgage. It was agreed between Getto and Peavey that the latter should build a house on the lot; that Getto should permit Peavey to obtain a loan on the lot and give a first mortgage as security therefor, and that Getto's mortgage for the purchase money should be subject to the mortgage given by Peavey to obtain the money with which to build the house. Peavey obtained a loan for $1150.00, which was in one mortgage for $1000.00 made to Strong and assigned to Melrose, and a mortgage for $150.00 made to Strong and assigned to Rogers. Getto made a deed and delivered it to Strong. Peavey executed the two mortgages, the one to Getto reciting that it was subject o the mortgages of Strong in the amount of $1150.00. All papers were recorded on the 4th of June. The contract for the sale of the lot under the terms as stated was made the 1st day of May. Work was commenced on the building on the 17th day of May, before the delivery and execution of the deed and mortgages. It was held by the lower court that the purchase money mortgage to Getto was a first lien, that the mechanic's liens were second, and that the mortgages to Strong and assigned to Melrose and Rogers were a third lien, but were subrogated to the rights of Getto, and that thereby the debts to Getto secured by the purchase money mortgage was the last lien upon the premises. The Supreme Court decided, at pages 29 and 30 of the opinion, as to the priority of all the liens as follows:

> "While there was no express stipulation between Getto and Peavey in this case to that effect, the agreement was that Peavey should execute a mortgage to secure the building fund, which by the consent of Getto should be a first and superior lien to that of Getto for the balance of his purchase-money. By all the ordinary rules of law, those furnishing material to and doing work for Peavey were bound to ascertain the nature and extent of his equity in the lot. To the extent of that equity, whatever it may be, the materials furnished and the work performed are a lien dating from the commencement of the building and prior to all subsequent liens or incumbrances, but, in the language of Mr. Justice VALENTINE, in the case of *Seitz v. U. P. Rly. Co.*, 16 Kas. 133: 'A lien upon an estate cannot be greater than the estate itself. A stream

cannot rise higher than its fountain.' It seems, therefore, that the operation of the mechanics' liens must be limited to the equity of Peavey in the lot, and that the trial court erred in determining the priority of liens; the true order being, so far as the legal estate is concerned: First, the mortgage to Melrose; second, the mortgage to Rogers; third, the mortgage to Getto; fourth, the mechanics' liens; and upon the equitable estate of Peavey: First, the mechanics' liens, and the mortgages following them in the order above stated."

The Supreme Court of the State of Kansas in the case of *Lumber Company v. Schweiter*, 45 Kans. 207, has also passed upon a situation similar to the one in the instant case. In that case Schweiter, the owner of a lot, sold the lot to one Jones, taking back a purchase money mortgage which was to be subject to a first mortgage which was to provide a building fund for the erection of a house upon the lot. The commencement of the building was long before the deed and mortgages were executed. In the opinion, at page 211, the court said:

"The lumber company, therefore, can claim only through the contract under which Jones held, and must take subject to the restrictions and limitations therein imposed on Jones. The contract stipulated that the $1,200 mortgage should be the first lien on the lots when they were conveyed to Jones, and the one given to Schweiter for the purchase-money should be a second, and an examination of the contract would have warned the lumber company that it must look to the proceeds of the first mortgage, which was doubtless provided as a fund for the erection of the building, or else it must make a contract with Schweiter, who was both the legal and equitable owner. Whatever equities Jones had in the property under his contract were subject and subordinate to the interest of the owner, as the contract provided; and as the lien can in no event cover more than the qualified interest that Jones had, it follows that such lien is subject and subordinate to the liens and mortgages expressly provided for in the contract."

In the case of *Lumber Company v. Arnold*, 88 Kans. 471, referred to in appellants' brief, it should be noted that the

mechanic's liens attached only to the equitable estate and the rights of the owner of the legal title were protected and he was given a first lien.

SECOND.

UNDER THE KANSAS STATUTE, AS INTERPRETED BY THE SUPREME COURT OF KANSAS, A BUILDING IS COMMENCED WHEN WORK OR LABOR IS BEGUN ON THE EXCAVATION FOR THE FOUNDATION, IN GOOD FAITH, PROVIDED THE PERSON WHO CAUSES THE WORK TO BE DONE HAD ANY TITLE OR INTEREST IN THE LAND, AND A LIEN WOULD ATTACH ONLY TO THE INTEREST WHICH HE HAD, AND PROVIDED FURTHER, SUCH PERSON HAD THE RIGHT OF POSSESSION AND CONSENT OF THE OWNER OF THE LAND TO COMMENCE WORK.

The District Court held that the building was commenced. The Circuit Court of Appeals held that it was not a real, *bona fide* honest commencement. (Transcript, pages 148 and 149.) The said commencement was not a beginning of a building, such as to arise to the dignity of a commencement. The Referee found that the work done was done to give preference to mechanic's liens over the mortgages. (Transcript, pages 10 and 149.)

We contend that rights cannot be founded upon fraud.

The District Court (Transcript, page 128), in the same sentence in which he states the commencement of the building, announces the doctrine that any person then, after the commencement of the building, may search the records and if no mortgages or other encumbrances be found of record, he may safely rely on his rights under the law to perfect the mechanic's lien.

The District Court overlooked the fact that a search of the records on January 3rd, 1911, and until noon of January 4th, 1911, would have discovered the title in Conklin, which disclosed all of the equities and rights for which the appellees contend in this action. (Opinion of Circuit Court of Appeals, transcript, pages 148 and 151.)

The mechanic's lien law provides that a contract shall be made with the owner, who, in the case at bar, until noon of January 4th, 1911, was Conklin, not Bron.

The case of *Nixon v. Lodge*, 56 Kansas, 304, was one where a loan was made, and the evidence of the same was not completed, nor filed for record, until September 28th, 1888, and work was begun on August 31st, 1888. Therefore, this lien fell under the ban of the statute, as a lien which came into existence and originated subsequent to the commencement of the building.

The General Statutes of Kansas, 1909, Section 6244, quoted in the transcript at pages 127 and 146, say: "Any person, who shall under contract with the owner, trustee, agent, husband or wife."

The lien in the case at bar sprang into existence at the instance of the delivery of the deed, notes and mortgages. (Transcript, page 126.))

The case of *Thomas v. Mower*, 27 Kansas, 265, has no application to the case at bar. This case is as follows:

> "The owner commenced work on the cellar; about the time the cellar was completed, he purchased lumber to build a house, which was built over the cellar. Subsequently, the lumber dealer filed a mechanic's lien on the property. Between the time of the digging of the cellar and the furnishing of the lumber, a mortgage was placed on the property. The mortgage was executed between the 1st and 15th days of May, 1880, and the cellar was about completed at the time of the execution of the mortgage. *Held*, that the mechanic's lien was prior to the mortgage."

In appellant's brief, at page 15, it is stated that at an early hour on January 3rd, 1911, Bron entered upon the premises with laborers and did an hour or two's work.

The facts were that on January 3rd, 1911, with zero weather (transcript, pages 29 and 33), an hour's work was done on frozen clods, in fraud, to get ahead of the mortgages. See Underwood's testimony, transcript, page 55: "I just went up there, and it was so cold I couldn't stand it, and I think I hauled out two loads and went home on January 3rd, 1911."

The Kansas mechanic's lien statute provides that the contract shall be made with the owner, that is, an owner with legal or equitable title, who has a lawful right of pos-

SEISIN OF THE GRANTEE.

The seisin of the grantee will not support a mechanic's lien, where the grantee executes a mortgage back to the grantor or a third party, and when such deeds and mortgage all appear to have been executed on the same date and recorded at the same time, they are as one transaction.

Clark v. Brickley, 32 N. J. Eq. 664 (Ballard), 474.
Russell v. Grant, 26 S. W. 958.
Moody v. Tashbold, 53 N. E. 1053.
Oliver v. Doney, 34 Minn. 292.
Reis v. Ludington, 13 Wisc. 275, 14 L. R. A. 305, 64 Am. St. Rep. 275.

In the case at bar, the District Court went beyond the Arnold case, above cited, and made a new rule, which, in the opinion of counsel for appellees, the Kansas statute does not authorize. There are cases that hold possession delivered to the vendee vests an equitable title, but possession without consent or knowledge of the vendor or mortgagee, is not the possession contemplated by law.

Title Co. v. Wrenn, 76 Am. St. Rep. 454.
Davidson v. Jennings, 83 Am. St. Rep. 49.
Saunders v. Bennett, 39 Am. St. Rep. 456.
Stevens v. Lincoln, 114 Mass. 476.
McGuire v. Guthrie, 6 Abbott N. S. N. Y. 58.
Courtmanche v. Blackstone, 64 Am. St. Rep. 275.

To the point that a person who furnishes either labor or material is bound to take notice of the title and the extent of the title of the owner, and if he be an intruder without right there can be no lien, see the following cases:

Taylor v. Murphy, 33 Am. St. Rep. 825 (Pa.).
Morrison v. Clark (Utah), 77 Am. St. Rep. 924.
Johnson v. Spencer, 96 N. E. 104 (Ind.).

THIRD.

THE APPELLANTS' THIRD PROPOSITION IS THAT THE BANKRUPT DID WORK ON JANUARY 3RD AND 4TH, WITH A MOTIVE OR INTENT OF PREFERRING THE MECHANIC'S LIENS, CANNOT AFFECT THE RIGHTS OF THE MECHANIC LIEN HOLDER WHO HAD NO KNOWLEDGE OF BRON'S MOTIVE.

The appellees assert that work done fraudulently, without the knowledge and consent of the owner, to defeat prior liens, cannot affect the right of the mortgagee.

Appellants, starting again in their argument with work done on the 3rd and 4th days of January, and stating that the mortgage was filed January 4th, after noon, assert some propositions. The statements are made in the face of the record that all of the instruments, deed and mortgages, were filed at the same time (Transcript, pages 12 and 13); the deed on January 4th, 1911, at 11:40 A. M.; appellee, The New Hampshire Savings Bank, mortgage on January 4th, 1911, at 12:10 M., and Conklin's mortgage on January 4th, 1911, at 12:30 M.

This date of filing demonstrates that these instruments were filed in regular chronological order, and the court will assume that they were done at the same time. They were all delivered at the same time (Transcript, pages 126 and 147), and until noon of January 4th, 1911, the title was in Conklin, and when the instruments were all recorded, all the title and equities of all the parties was published to the world, and all persons charged with notice by the record could then have ascertained the rights and equities of all the parties.

The quotation from the District Court (Transcript, page 127) uses the language, "prior to the filing of the mortgages."

This court will note that it was also prior to the filing of the deed, which was the foundation of Bron's title or equity in the land. The fraudulent intent and corrupt motive of Bron, Jr., is a criterion if the work was commenced prior to any title or vestige of title in Bron. The instruments were delivered at the same instant of time and at that moment, Bron got a title and the mortgage liens sprang into existence, and then only could Bron lawfully do any work, and, therefore, work that was done prior to that time, was in fraud of the rights of the mortgagees.

Appellees concede that if a mortgage is actually negotiated and executed after improvements are commenced, the fact that a mortgagor deceives the mortgagee does not create an equity which puts the mortgage ahead of the mechanic's liens, but that is not the case at bar.

In appellants' brief at page 20 it is said:

> "When a statute provides for a lien which shall be a preferred lien to all which shall attach subsequent

> to the commencement of the building, and another statute provides that a mortgage shall not be valid except as to the parties until the mortgage is deposited for record, makes the dates when the respective acts were done the sole criterion in determining priority."

This assumes that a mechanic's lien claimant is a purchaser for value, which is not the law.

The court will note that Conklin gave a deed to Bron; he immediately took back a mortgage from Bron, which recited that that mortgage was subject to another mortgage of $7500.00.

In our judgment, appellants' contention is opposed to the law, as written. See *Mortgage Co. v. Winters*, 94 Kansas, 619, lower third of page.

On the same page 20 of their brief, appellants argue that when a mechanic's lien claimant commences work and the mortgages were not recorded, they need not look any farther.

This is not the law. The filing of the mortgage gave notice of the claim of Bron to the title, which was the foundation of the mortgage and the record which the materialmen were charged with disclosed that the Bron deed, filed the same hour, was a part and parcel of the entire transaction, and when Bron got the title, he got the same with the mortgage encumbrances thereon, and all persons were charged with notice that Bron had no title until noon of January 4th, and what title he then got was mortgaged.

Any other rule of law would disturb all real estate titles.

The claim is made in appellants' brief, at page 21, that the situation is the same as that of an innocent holder of a note, which cannot be enforced between the parties, but which in no wise prejudices an innocent holder.

This proposition is an astonishing one, as applied to the case at bar, and shows a hazy conception of the legal questions before this court. Outside of the law of negotiable instruments, there is no such a thing in law as an innocent purchaser, unless made so by statute or unless created by estoppel, and there is no pretense of either in the case at bar.

In their brief, at page 20, counsel for appellants cite the case of *Gordon v. Tooey*, 15 N. J. Eq. 112, 82 Am. Dec. 273.

An examination of this case shows that it has no application whatsoever to the case at bar, as the owners made a deed which was a mortgage and "which effectually disposed of the objection to the lien."

At page 22 of appellants' brief it is urged that Bron had the equitable title on December 22nd, 1910, under some kind of a vague oral understanding. There is nothing in the record to sustain this contention, and if Bron had not received any deed on January 4th, at noon, and executed and delivered the mortgages, he would have been a trespasser upon the land and subject to ejectment. All that was done prior to January 4th, 1911, was null and void. Cases are cited to the effect that if a person has a lawful right to do an act, his motive will not defeat the act. This is "horn-book" law.

Appellees' contention is that Bron had no title, either legal or equitable, until the deed and the mortgages were delivered, and had no right of occupancy or possession to the land; that no one knew that he did any work, except Bron, and no one consented to his doing any work. Hence, his motive is material.

The cases cited by appellants' counsel, as to the motive, are not applicable, for the reason that they are founded on a legal right to do an act. The cases cited are bottomed on the fact that the absolute right to do the act done existed. In the case at bar, there never was any right to do any work until the instruments were delivered.

The Kansas conveyance acts, General Statutes of Kansas, 1901, Sections 1221, 1222 and 1223, are the statutes that govern the proposition as to record notice, referred to by appellants:

> SECTION 1221: "Every instrument in writing, that conveys real estate, or whereby real estate may be affected, proved or acknowledged, may be recorded in the office of the Register of Deeds."
>
> SECTION 1222: "Every such instrument in writing, certified and recorded in the manner prescribed, shall from the time of filing the same with the Register of Deeds, impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase with notice."

SECTION 1223: "No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same are deposited with the Register of Deeds."

The above statutes are similar in their terms to those of Iowa, Wisconsin and other states.

A mechanic's lien holder is not an innocent purchaser, under the above act and no other statute is applicable to the facts. See—

Fletcher v. Kelly, 21 L. R. A. 347, Iowa.
Nashua v. Edwards, 61 Am. St. Rep. 226, Iowa.
Noyes v. Crawford, 96 Am. St. Rep. 367.
Matwig v. Mann, 65 Am. St. Rep. 47, Wisc., 96 Wisc. 213.

In the case of *Lang v. Adams*, 71 Kansas, 311, bottom of page, it is said:

"A mechanic's lien holder is required to know who the owner is and name him in the lien. The statute does not say that the owner of record can create a lien, nor that a contract with some one who has an apparent title is sufficient for the lien. The provision is that the contract shall be with the owner, and this necessarily means the actual owner of the interest in the property."

Our view is that judgment creditors, attaching creditors, and mechanic's lien holders, so far as liens on the land are concerned, are the same in Kansas and are subject to all existing equities, titles and liens, whether recorded or not.

Burk v. Johnson, 33 Kansas, 337.
Dearborn v. Vaughn, 46 Kansas, 506.
Ellwell v. Hitchcock, 41 Kansas, 130.
Holden v. Garrett, 23 Kansas, 98.

The mechanic's lien is a creature of statute.

Nixon v. Lodge, 56 Kansas, 304.
Zabriskie v. Greater Am., Etc., Co., 62 Lra. 369, and notes to same.

There is no reason why a mechanic's lien holder should have any different status than a judgment or attaching creditor.

The legislature could have said "*all liens recorded after the commencement of the building*," but what it did say was "such liens shall be preferred to all other liens and encumbrances, which attach subsequently to the commencement of the building."

The liens of the appellees in this case attached upon the delivery of the deed and mortgages.

FOURTH.

APPELLANTS ASSERT THAT MECHANIC'S LIEN CLAIMANTS ARE ENTITLED TO A LIEN UPON THE IMPROVEMENTS, SEPARATE AND APART FROM THE LAND, REGARDLESS OF THE PRIORITY OF THE MORTGAGES.

This proposition is denied by the appellees. There are statutes that provide for the condition claimed by the appellants, but the Kansas statute quoted in the record (Transcript, pages 127 and 146) is not in that class.

The Kansas statute provides that "any person who shall, under contract, etc.. . . . shall have a lien upon the whole of said piece or tract of land for the amount due."

Statutes which provide for the separation of liens also provide for a method in the sale, valuation or appraisement, and a distribution of the fund arising from the value of the land and the value of the improvements.

Under the mechanic's lien law, Section 5124 of the General Statutes of Kansas, 1901, it is said:

> "In all cases where judgments may be rendered in favor of any person or persons to enforce a lien under the provisions of this act, the real estate or other property shall be ordered to be sold as in all other sales of real estate."
>
> SECTION 5127: "If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them paid in proportion to the amount due each."

If the contention of the appellants is correct, then court, without a statute, must inject into the statute some plan for the separate appraisal and valuation, and find the different values of the land and the value added by the improvements, but as a reason why this cannot be done the statute provides for a sale of the land and improvements, and if the entire proceeds be insufficient to pay all liens,

then the same shall be paid in proportion to the amounts due.

The case of *White v. Kincade*, 95 Kansas, 466, falls short of the claim made by the appellants in their brief at page 24. In this case, the court said:

> "The vendor, who induces one who has contracted to purchase to expend labor and material, cannot defeat the claim of the lien, etc."

The claim made on page 24 of appellants' brief, that many states, including Kansas, have adopted the rule of separate liens on land, is incorrect in so far as Kansas is concerned.

No one doubts that a leasehold estate is subject to a mechanic's lien, and a life estate might become subject to a mechanic's lien, but the tenant has an interest, which interest only may be subject to the lien. (*Zabriskie v. Greater Am., etc.*, 63 L. R. A. 369, and notes thereto.)

The case of *McCrie v. Lumber Company*, 7 Kans. App. 39, cited in appellants' brief, at page 25, has never been expressly overruled by the Supreme Court, but it has never been followed by any court since it was rendered, and the case is never cited as an authority in the Kansas courts. This case would be applicable in a leasehold estate, where no lien could attach to the land at all, and can only attach to improvements.

The mechanic's lien acts of 1859 and 1862 were wiped out and the present act put in place thereof.

In *Seitz v. U. P. Railroad*, 16 Kansas, 133, cited in appellants' brief at page 28, this was a case under the act of 1862, and Sections 14 and 17 cited were not re-enacted in 1868 or at any time subsequently, but in lieu thereof is the present act, as it is set forth in the record at pages 127 and 146. This change of statute was intended to change the practice, the judgment, the sale and the distribution of the proceeds.

Appellants' citation of a repealed statute of 1859 and 1862, can be of no more force in the presentation of this case than the statute of another state. The present mechanic's lien statute governs the right of all of the parties in this action.

It will be noted that in the case of *McCrie v. Lumber Co.*, 7 Kans. App. 39, above cited, the Kansas Court of Appeals assumed the function of the legislature and injected into the statute provisions that the legislature intentionally omitted, viz.: Separate sales, valuations and appraisements.

In that case, the court said: "The construction put on the statute by defendant was the same as by other courts on similar statutes," all of which was a pure assumption, as no court, under a statute like the Kansas statute, has ever made such a judgment or decree.

The words, "or either of them," as applied by the Kansas Court of Appeals, are erroneous, as that would refer to a leasehold estate, but would have no application to an estate where the land upon which the improvements were made had the title vested in the owner.

The case of *Getto v. Friend*, 46 Kansas, 24, 30, referred to in appellants' brief at page 28, is not applicable to the case at bar. It was agreed by the parties that Bron should have a deed and execute a mortgage, and this mortgage should be ahead of the Conklin mortgage, and this was all put into effect by the delivery of the deed and mortgages at the same instant of time.

And in the above case the vendee was put in the possession by Getto, and the case does not apply.

There is an assumption by appellants that Bron was in the open, notorious, peaceable possession, with vendor's knowledge and consent, which the appellees assert is contrary to the facts

FIFTH.

UNDER THE KANSAS STATUTE OF FRAUDS, THE ORAL AGREEMENT THAT THE MORTGAGES SHOULD BE EXECUTED AND DELIVERED CONCURRENTLY WITH THE EXECUTION AND DELIVERY OF THE DEED TO THE BANKRUPT AND BE A FIRST AND PRIOR LIEN ON THE PROPERTY, AND THAT THE KIMBALL MORTGAGE SHOULD BE PRIOR TO THAT OF CONKLIN, WAS VOID AS TO THE APPELLANT MECHANIC'S LIEN HOLDERS.

Appellants in their fifth proposition, above quoted, refer to the statute of frauds as having a bearing on this case. At the outset their argument depends upon the assumed fact that the deed was delivered as a conveyance of title before

In the case of *Wager v. Briscow*, 38 Mich. 587, it is said:

> "A mechanic's lien law is an innovation of the common law over the rights of property by permitting the institution of private charges on property without the owner's consent. The provisions of the mechanic's lien law cannot be extended in their operation and effect beyond the plain, ordinary and fair sense of the terms, and those who assert liens resting on mechanic's liens must bring themselves plainly and distinctly within the terms of the statute."

See also *Stevens v. Lincoln*, 144 Mass. 476.

In the case of *Ely v. Pingry*, 56 Kansas, 17, it is held:

> "A mechanic's lien cannot attach to a building for material to which the owner of the land has never consented."
>
> "The grantor of land who, at the time of the execution of the conveyance, takes back a mortgage for balances due him is not required to search the records for encumbrances by the grantee, while he is a stranger to the title and before the deed is executed."

The reasoning of this case sustains the contention of the appellees that those who have transactions with the grantee are bound by the equities between the parties.

In the above case, at page 306, it is said:

> "Ely did not part with his money on the faith of the record and he does not occupy the position nor is he entitled to the protection of a *bona fide* purchaser or holder."

Our contention is that anything done prior to the instant delivery of the deed in the case at bar to Bron could not prejudice either the rights of The New Hampshire Savings Bank or P. J. Conklin.

See—

Missouri Valley v. Reed, 45 Pac. 722.
Saunders v. Bennett, 39 Am. St. Rep. 456 (Mass.).

We further contend that one in possession of land, under a contract of purchase, is not an owner within the meaning of the mechanic's lien law, and the real owner is not estopped by the fact that work was done on the premises, when it does not appear that such owner knew who was doing the work or what claim would be made thereunder, and if a conveyance is made and a purchase money mortgage is taken back, then such mortgage will be prior to the mechanic's lien.

See *Courtmanche v. Blackstone*, 170 Mass. 50, 64 Am. St. Rep. 275.

We further contend that a vendor who sells land and reserves the title as security for purchase money, is not, from the fact that he knew of the purpose of the buyer to build on the property and the fact that the buyer is proceeding to accomplish such design, deemed in law to have consented to such building so as to make his title inferior to mechanic's liens.

The most that can be claimed for the appellants in this case is that Bron, at the time he went to work, had an indefinite parol agreement which had never been carried out, and that possession by Bron was not with the knowledge and consent of the appellees.

Referring to the case of *Reis v. Ludington*, 13 Wisc. 276, there is no distinction between a purchase money mortgage and a vendor's lien, where vendor's liens are permissible, and the same have preference over mechanic's liens.

We further contend that the statute in Kansas does not create any distinction between the ownership of a building and of the land, and the building follows the land and it cannot be separated, in the absence of a statute, by a judgment of the court.

We further contend that a mechanic acquires a lien from the commencement of a building only equal to that of a judgment upon the legal or the equitable title and is subject to the same rules. 32 N. J. Eq. 664, 11 L. R. A. 742, 39 L. R. A. (N. S.) 84.

The title to the land does not, for a single instant rest in the vendee, but passes from him and rests in the mortgagee.

Missouri Valley v. Reed, 45 Pac. 722.

Prior to the delivery of the instrument that created the title, no one has any rights to the land. When delivered, the parties' rights are fixed by the contract, as shown by the instruments. See

Gillespie v. Bradford, 27 Am. Dec. 494.
Reis v. Ludington, 80 Am. Dec. 741 (Wisc.).
Campbell's Appeal, 78 Am. Dec. 373.

In *Jones v. Osborn*, 108 Iowa, 409, a mortgage in the situation of The New Hampshire Savings Bank mortgage, in the case at bar, was held to have a prior lien. And to the same effect is the case of *Bartlett v. Bilger*, 61 N. W. 233.

In the case of *Thorp v. James, Inc.*, 41 N. E. 978, it was held:

> "Where a recorded mortgage stated that it was junior to another mortgage, not recorded, and the lien attached before the last one, the last mortgage and the mechanic's liens were junior to the first mortgage."

In the case of *Lumber Co. v. Schweiter*, 45 Kansas, 207, and *Getto v. Friend*, 46 Kansas, 24, the Supreme Court says:

> "If a vendee had entered with the knowledge and consent of the vendor, a different principle would be involved and govern in determining the rights of the parties. The vendee had no such title; the deed and mortgage were made at the same time; prior to title, there was not an instant of time that the vendee owned any title or right, and the title obtained thereafter cannot relate back, so as to affect the rights of the vendor."

To the same effect is *Smith v. Wilkins*, 64 Pac. 760 (Oregon), in which case it is said:

> "The deed and mortgage having been executed at the same time, there was no occasion for the mortgagee to post up notices to protect his rights."

In the case at bar, the instruments were delivered and recorded at the same time, and Bron, without the consent or knowledge of the owner, went on the lots clandestinely, with the intent, as found by the Referee (Transcript, page

10, figure 14) as a trespasser, with the avowed intention of destroying the vendor's rights and the rights of the holder of the $7500.00 mortgage.

In the case of *Toledo v. Hamilton*, 134 U. S. 299, it is said:

> "A recorded mortgage cannot be displaced by a contract and is prior to a mechanic's lien on a subsequent contract."

There is no difference between a recorded mortgage and a mortgage that is unrecorded, if parties are charged with the equities, as in the case at bar.

In the case of *Ettridge v. Bassett*, 136 Mass. 314, it is held:

> "Land was conveyed on August 20th, by deed dated August 13th. A mortgage was taken back in accordance with the agreement of August 13th. *Held:* The vendee could not subject the land to any lien for labor done prior to August 20th, unless done with the authority of the owner of the land."

In the case in 63 S. W. 306, a Texas case, it was held:

> "The fact that improvements were contemplated does not give a mechanic's lien holder prior right to a mortgage, where the improvement was not commenced until after the delivery of the instrument. The knowledge of the mortgagee that a mortgagor intended to build on the premises will not postpone his lien to a mechanic's lien."

See 27 Cyc. 326. To the same effect is—

Thorp v. James (Ind.), 41 N. E. 978.
Henry v. Hatton (Nebr.), 79 N. W. 616.
Allis-Chalmers Co. v. Central Trust Co., 111 C. C. A. 429.
Monks v. Provident Institution for Savings, 44 Atlantic, 966.
Chaffee v. Chested, 96 N. W. 161 (Nebr.).
Carriger v. Mackey, 44 N. E. 266 (Ind.).
Oatley v. Haviland, 46 Miss. 19.

On the same proposition that a mortgage may not be displaced by a subsequent lien, where the deeds and mortgages are part of one transaction, and that the registry laws of the State have nothing to do with it, see—

New Orleans & Ohio R. R. v. Mellen, Trustee, 12 Wallace, 362.
Jones v. Hancock, 1 Md. Chan. 187.
Steininger v. Raeman, 28 Mo. App. 564.
McKim v. Mason, 3 Md. Chan. 186.
Bernard v. Toplitz, 39 Am. St. Rep. 465.
Haxton Steam Heater Co. v. Gordon, 33 Am. St. Rep. 776.
Kilpatrick v. Kansas City, 41 Am. St. Rep. 758.
Harris v. Youngstown Bridge Co., 33 C. C. A. 75.

In this last case, it is said:

"A mortgage lien attaches to after-acquired property in the condition in which the mortgagor takes it, subject to all liens and equities valid against the vendee and mortgagor, which arise in the act of the purchase or acquisition of title thereto and qualify the scope and extent thereof."

In the same case, at page 79, it is said:

"A material-man, in the absence of a statute, who stipulates with the owner for liens upon improvements, with a right to remove them, only acquires such rights in subordination to the lien of a prior mortgage upon the land."

In the same connection, see—

Railroad v. Cowdry, 11 Wallace, 459.
Porter v. Steel, 127 U. S. 267.
Thompson v. Railroad, 132 U. S. 68.
Wade v. Railroad, 149 U. S. 327.

COMMON LAW PRINCIPLE.

A mechanic's lien is a creature of statute. It was not recognized at common law. There is no equitable principle applied, save and except in connection with equities raised by an act which the courts apply in the nature of an estoppel.

Nixon v. Lodge, 56Kansas, 304.
Vanstone v. Stillwell, 142 U. S. 346.
Lumber Co. v. Arnold, 88 Kansas, 471.
Lang v. Adams, 71 Kansas, 310, last paragraph on page.
Davidson v. Jennings, 83 Am. St. Rep. 49 (Calif.).
Wilcox v. Woodworth, 29 Am. St. Rep. 223 (Conn.).
National Fire Proof Co. v. Huntington, 129 Am. St. Rep. 228.
Conroy v. Perry, 26 Kansas, 472.

In the case of *Logan Planing Mill v. Aldrich*, 129 Am. St. Rep. 1038, it is held:

> "To enable a court of equity to enforce a mechanic's lien, it must have a legal validity. Equity follows the law."

Hedges v. Dickson, 150 U. S. 122.
Magniac v. Thompson, 15 Howard, 299.

As defined by the courts, there is no element of any estoppel against the appellees in the case at bar.

See—
Clark v. Coolidge, 8 Kansas, 189.
Rambo v. Bank, 88 Kansas, 258.

The case of *Lumber Co. v. Arnold*, 88 Kansas, 471, cited by appellants at page 12 in their brief, contains nothing which limits the appellees' rights, as in that case possession was delivered to the vendee, with knowledge and consent work was performed, and notwithstanding such delivery of possession, the court gave the vendor a first lien on the land.

And the same principle for which we contend was applied in the following cases:

Martsoff v. Barnwell, 15 Kansas, 612.
Huff v. Jolly, 41 Kansas, 537.
Lumber Co. v. Schweiter, 45 Kansas, 207.
Getto v. Friend, 46 Kansas, 24.
Conroy v. Perry, 26 Kansas, 475.

the execution of the mortgages. Appellants again select isolated phrases and sentences of the Referee's certifi and the District Court's opinion to establish this f Their position as to this is answered by the same contenti as made by the appellees under the first proposition of t brief.

If it could be said that appellants' position as to facts was correct, then the answer to this contention wou be that the transaction involved an executed contract a the statute of frauds does not control in such a situation,

It is well settled that the statute of frauds refers only executory contracts and in no way affects or relates to executed one.

James v. Manning, 79 Kansas, 830.
Randolph v. Wilhite, 78 Kansas, 355, at page 365.

CONCLUSION.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, in this case, set out in the transcript at pages 144 to 151, reviews all the facts in the case, construes the Kansas statute as to mechanic's liens, reviews the Kansas cases applicable to the facts, and reaches the conclusion that the contention of the appellees is well founded, as a matter of law, on the facts as established.

Appellees, therefore, submit that the judgment of the Circuit Court of Appeals should be affirmed.

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ADDENDA.

In writing this brief there was accidentally omitted the case of *nd vs. Harrison*, 96 Kans. 542, 152 Pac. 655. This case be- a recent and important decision, we are making this addition this brief. In this case William H. Harrison, under a will his father, had the use as tenant at will of a quarter section land. A house on the property was partially destroyed by re. He rebuilt the house. The question was whether or not Materialmens' Lien could attach for lumber used in the con- ruction of the same, that is, did Harrison have sufficient in- est to support a lien, and also could the building be sold sep- ate from the real estate to satisfy the lien. It was held:

"No lie was adjudged against the land itself, or the interest of the trustee, and none could have been, since the statute requires the material to have been furnished under contract with the owner. His knowledge of its being furnished is not sufficient.

* * * *

"It is said that a mechanic's lien may attach to a building, apart from the building (27 Cyc. 226), although the decisions to that effect are for the most part based upon statutes materially different from ours. It attaches to a leasehold interest, and even where this is only that of a tenant at will the lien covers any building or improvement which the tenant would have right to remove. (*Hathaway v. Davis & Rankin*, 32 Kan. 693, 5 Pac. 29; *Lumber Co. v. Malone*, 8 Kan. App. 121, 54 Pac. 692; *Ombony v. Jones*, 19 N. Y. 234; *Boisot on Mechanics' Liens*, 295; *Phillips on Mechanics' Liens*, 3d ed., 191, 193).

The question whether the plaintiffs have a lien upon the building, or any part of it, depends upon whether a right of removal existed in the tenants." * * * *

* * * * "Under the facts found the whole of the reconstructed building must be regarded as a part of the realty, no part of which is owned by the tenant or subject to removal by him. We are constrained to hold that the mechanic's lien attaches neither to the land or its income, nor to the building, and since a sale of the leasehold of a tenant at will would be entirely barren of practical result, the plaintiffs are without remedy against the property." * * *

VARNER *v.* NEW HAMPSHIRE SAVINGS BANK.

HAINES TILE & MANTEL COMPANY *v.* SAME.

JACKSON-WALKER COAL & MATERIAL COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 264, 265, 266. Argued March 8, 9, 1916.—Decided April 3, 1916.

The essential question in this case being one of fact, and notwithstanding the different conclusions reached by the courts below, this court after consideration thereof holds that the evidence sustains the conclusion of the Circuit Court of Appeals that there was no such commencement of building as would give the mechanics' lien priority over the mortgages on the property within the meaning of the Kansas statute.

216 Fed. Rep. 721, affirmed.

THE facts are stated in the opinion.

Mr. Chester I. Long, with whom *Mr. J. A. Brubacher*, *Mr. George Gardner* and *Mr. A. M. Cowan* were on the brief, for appellants:

The property in controversy was conveyed to the bankrupt on January 3, 1911, and the work of excavating for the foundation was begun on January 3, 1911, and continued on the morning of January 4, 1911.

Under the Kansas statute, as construed by the Supreme Court of that State, a building is commenced when work or labor is begun on the excavation for the foundation, which in this case was on the morning of January 3, as found by the Referee and approved by the District Court.

Even if the bankrupt did the work on January 3 and 4, 1911, with the motive or intent of preferring the mechanic lien holders to the mortgagees, that cannot affect the

rights of the mechanic lien holders, who had no notice or knowledge of such motive or intent.

Mechanic lien claimants are entitled to a lien upon improvements separate from the land, regardless of the priority of the mortgages.

Under the Kansas Statute of Frauds the oral agreement that the mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt and be a first and prior lien upon the property and that the Kimball mortgage should be prior to that of Conklin, was void as to the appellant mechanic lien holders.

In support of these contentions, see: *Ansley* v. *Pasbaro*, 35 N. W. Rep. 885; *De Villanueva* v. *Villanueva*, 239 U. S. 293; 20 Am. & Eng. Enc. (2d ed.), 479; *Bell* v. *Coffin*, 2 Kan. A. 337; *Boswell National Bank* v. *Simmons*, 190 Fed. Rep. 735; *Chicago Lumber Co.* v. *Schreiter*, 45 Kansas, 207; *Chicago, R. I. & P. Ry.* v. *Dowell*, 229 U. S. 102; *Coler* v. *Arts*, 152 Fed. Rep. 943; *Conrad* v. *Starr*, 50 Iowa, 470; 27 Cyc. 240, 250; *D. W. & Co.* v. *C., M. & St. Paul Ry.*, 85 Fed. Rep. 876; *Epstein* v. *Steinfeld*, 210 Fed. Rep. 236; *Getto* v. *Friend*, 46 Kansas, 24; *Gordon* v. *Torrey*, 15 N. J. Eq. 112; *Harsh* v. *Moran*, 1 Kansas, 293; *Hathaway* v. *Davis*, 32 Kansas, 693; *Hayes* v. *Fessenden*, 106 Massachusetts, 230; *Huff* v. *Jolly*, 41 Kansas, 537; *Hukill* v. *M. & B. S. R. Co.*, 72 Fed. Rep. 751; *Hussey* v. *Richardson Co.*, 148 Fed. Rep. 598; *Ill. Cen. R. R.* v. *Sheegog*, 215 U. S. 308; *Kansas Mortgage Co.* v. *Weyerhaeuser*, 48 Kansas, 335; *McCrie* v. *Lumber Co.*, 7 Kan. A. 39; *Missouri Lumber Co.* v. *Reid*, 4 Kan. A. 4; *Ohio Bank Co.* v. *Mack*, 163 Fed. Rep. 155; *Osborne* v. *Barnes*, 179 Massachusetts, 597, 61 N. E. Rep. 276; Phillips on Mechanics' Liens (§ 235); *Poff* v. *Adams*, 226 Fed. Rep. 187; *Seitz* v. *Un. Pac. R. R. Co.*, 16 Kansas, 134; *Smith Lumber Co.* v. *Arnold*, 88 Kansas, 463, 468; *Thomas* v. *Mowers*, 27 Kansas, 265; *Tilghman* v. *Proctor*, 125 U. S. 138; *Wagar* v.

Briscoe, 38 Michigan, 587; *Warax* v. *C., N. O. & S. Ry.*, 72 Fed. Rep. 640; *West* v. *Badger Lumber Co.*, 56 Kansas, 287; *White* v. *Kincade*, 95 Kansas, 466.

Mr. Kos Harris and *Mr. Samuel C. Eastman*, with whom *Mr. V. Harris*, *Mr. R. L. Holmes*, *Mr. C. G. Yankey* and *Mr. W. E. Holmes* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This is a contest for priority between creditors of a bankrupt. Appellees claim under mortgages upon certain real estate in Wichita alleged to have been recorded before building operations on the property were commenced. Appellants maintain construction began prior to recordation and that they are secured by preferred mechanics' liens created by the Kansas statute. Disagreeing with the District Court but in accord with the referee's opinion, the Circuit Court of Appeals (216 Fed. Rep. 720) held that no "such work as amounted to the commencement of the building within the meaning of the Kansas statute" was performed prior to the time when the mortgages were placed on record, and "that what was done was but a mere pretense at the commencement of a building, done to defeat *bona fide* prior liens." And it accordingly adjudged the mortgage creditors entitled to priority.

The essential question presented is one of fact; and there is sharp dispute in the testimony. Substantial difficulties are disclosed but after considering the evidence we think it sustains the conclusions reached by the Circuit Court of Appeals; and the judgment entered there is accordingly

Affirmed.